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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

James R. King,

Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the District Court Correctly Hold that Illinois' Congressional District 4 is a Narrowly-Tailored Remedy to Further a Compelling Governmental Interest?

2. Can this Bizarre, Uncouth District, Which Resembles a Rorschach Blot and Was Drawn on the City Block Level, Be a Narrowly-Tailored Judicial Remedy for a Violation of Section 2?

3. Did the District Court Err When It Applied the Standard of "Clear Error" to the Evidence in the Case under a Modified Rule 60(b)?

LIST OF PARTIES

Plaintiff

James R. King

Defendants

State Board of Elections
David E. Murray
Lawrence E. Johnson
Hannelore Huisman
Judith Jones
Langdon D. Neal
Theresa M. Petrone
Wanda Rednour

Defendant Intervenors

Bobby Rush
Timuel Black
Al Johnson
Elvira Carrizales
Neomi Hernandez
The Chicago Urban League

United States

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BASIS OF JURISDICTION

The District Court for the Northern District of Illinois entered the Order in this cause on August 1, 1997, denying the Plaintiffs request for temporary and permanent injunctive relief. The Plaintiff files this appeal pursuant to 28 U.S.C. Sec. 1253, Direct Appeals from Decisions of Three-Judge Courts. Plaintiff's Notice of Appeal was filed on August 29, 1997. Notice of Appeal, Appendix, 1.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The United States Constitution provides at Article III, Section 2 that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...; [and] to Controversies . . . ."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.". The relevant statutory provision is section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, the pertinent parts of which are reproduced at App. 75.

Illinois State Statutory law on Precincts, Illinois Compiled Statutes, 735 ILCS Ch. 5/11-2, et seq., is reproduced at App. 76.

STATEMENT OF THE CASE

On November 12, 1996 this Court vacated and remanded this case "for further consideration in light of *Shaw v. Hunt*, 517 U.S. ___ (1996) and *Bush v. Vera*, 517 U.S. ___ (1996). *King v. State Board of Elections, et al.*, ___ U.S.___, 117 S.Ct. 429 (1996)." On August 1, 1997, the lower court, upon reconsideration of this matter, "affirm[ed] its earlier ruling that the Fourth District passes constitutional muster. . . ." *King v. State Board of Elections, et al.*, ___ F.Supp.___ (1997) (*King II*), Opinion 2, App. 73. The case thus returns for a second appeal to this Court. The lower court issued its original opinion upholding District 4 on March 13, 1996. *King v. State Board of Elections, et al.*, ___ F.Supp.___ (1996) (*King I*), Opinion 1, App. 4 et seq.

A. *Hastert et al. v. State Board of Elections*

The congressional districting map challenged in this case was court-ordered. *Hastert et al. v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991). Prior to the initiation of *Hastert*, the 1990 census data indicated that the State of Illinois was to lose two congressional seats, due to a comparative decline in population growth. *Id.* at 638. The Illinois legislature failed to enact a plan and various Democratic and Republican party members initiated the *Hastert* action to ensure congressional redistricting. Shortly thereafter, a group of Hispanic and African-American voters filed a similar action which also sought the creation of an Hispanic majority congressional district under §2 of the Voting Rights Act. *Id.* These cases and others were consolidated. *Id.*

All the parties to the *Hastert* litigation agreed that the "population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Id.* at 640. The *Hastert* court also said that "[i]ndeed, an agreement on this issue [the creation of an Hispanic majority district] may be the crucial factor in facilitating the creation of an Hispanic district." *Id.* Consequently, the district court in *Hastert* approved District 4, relying upon the requirements for a §2 violation under the Voting Rights Act pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986). The *Hastert* court found that the three threshold conditions of *Gingles* were met, and that under the totality of the circumstances, District 4 was required under §2 of the Voting Rights Act. The specific findings of fact will be discussed in detail as they relate to the instant case in the course of the Argument.

B. Lower Court's First Decision.

The Plaintiff, James R. King, a resident of the Fourth Congressional District ("District 4"), brought an equal protection challenge in February, 1995. The lower court, two of whose judges presided over the *Hastert* trial, found that District 4 was predominantly drawn on the basis of race and indicated that it would apply strict scrutiny. The evidence which the lower court cited supporting its finding that District 4 was predominantly drawn on the basis of race was the *Hastert* court's perception that it had to create four super-majority minority districts, one of which would be Hispanic, Opinion 1, App. 39-40, and that the boundaries of District 4 were "drawn to maximize the percentage of Hispanics located within the District.". Opinion

1, App. 42-43.

The lower court proceeded through the required analysis of a §2 district subject to an Equal Protection challenge and adopted a majority of its findings of fact from the evidence admitted in the *Hastert* court. Even though the lower court gave the Plaintiff the opportunity to cross-examine persons who submitted affidavits and other evidence in *Hastert*, this did not compensate for the undue weight the court below assigned to that evidence. The lower court found that the *Hastert* court had a "strong basis in evidence" for finding that the threshold conditions of *Gingles* were met and, further, that a violation was established under the "totality of the circumstances."

The lower court upheld District 4 saying that it was "narrowly-tailored". Although the *Hastert* court never applied strict scrutiny to District 4 and, therefore, never determined that it was "narrowly-tailored" in that case, the lower court held that the Plaintiff failed to establish a violation of the Equal Protection clause because he did not show that the *Hastert* court "abused its discretion" when it adopted the "narrowly tailored" District 4. The lower court's deference was ostensibly justified on the basis of a "modified" application of Rule 60(b). King objected to this standard of review of the evidence. Plaintiff's Additional Trial Brief, App. 102. The details of the lower court's findings will be addressed in the course of the argument.

C. Appeal to United States Supreme Court, Order Remanding for Reconsideration and Lower Court's Second Decision.

The Plaintiff filed his first appeal to this court on March 22, 1996, contesting the lower court's decision to uphold District 4 as narrowly-tailored. On November 12, 1996, this Court ordered the lower court to reconsider its decision in light of *Bush v. Vera,* 517 U.S. ___, 116 S.Ct. 1941 (1996) and *Shaw v. Hunt,* 517 U.S. ___, 116 S.Ct. 1894 (1996). That order followed upon the Motion to Vacate and Remand filed by the Department of Justice. In that Motion the Department of Justice stated that

> it would be appropriate to remand this case to the district court so that that court, in the first instance, may apply the teachings of *Bush* and *Shaw II* to the facts of this case. On remand, the district court could, if it deemed it necessary

or desirable, take additional evidence regarding the application of the *Bush* and *Shaw II* narrow-tailoring standards to this case.

Motion, October 1996.

Upon remand, on January 31, 1997, the Plaintiff filed a Motion to Set for Hearing. The Motion alternatively sought relief based upon the evidence already in the record in light of the decisions of *Bush v. Vera* and *Shaw v. Hunt* if the lower court were to decline to have an additional hearing. The lower court denied Plaintiff's request for an additional hearing, and denied it again upon his Motion for Reconsideration saying "[n]either *Shaw II* nor *Bush* introduces legal guidelines that require additional findings of fact by this court" and that "the pertinent factual data needed to determine the constitutionality of the Fourth District was before this court upon its initial adjudication of this matter." Opinion 2, App. 73. All briefs were submitted to the court by April 18, 1997, and on August 1, 1997 the lower court issued a short opinion affirming its earlier ruling.

SUMMARY OF ARGUMENT

Even though the Plaintiff was not a party to the *Hastert* proceeding in November 1991, the lower court "modified" Rule 60(b) in order to apply a "clear error" standard to the evidence presented at the trial of this case in December 1995. This standard in effect displaced the presumption which should have been made in favor of the Plaintiff that the racially drawn District 4 was unconstitutional and, consequently, displaced the burden of the Defendants and Defendant-Intervenors, (hereinafter "Defendants")[1] to produce evidence to justify District 4. By giving the *Hastert* decision this binding effect, the lower court failed to make the independent examination of District 4 required by the decisions of this Court.

In light of the obviously bizarre shape of District 4, the lower court on remand had the obligation to independently and strictly scrutinize whether District 4 "subordinated traditional districting principles to race more than was reasonably necessary", *Bush* at ___, 116 S.Ct., at 1961. Review of the lower court's reconsidered opinion, and the original opinion, indicates that the lower court erred when in both opinions it strictly deferred to the *Hastert* court's

[1] "Defendants" refers primarily to Defendant-Intervenors MALDEF and the Department of Justice, who most actively defended this case.

decision to create District 4, and upheld in both instances a bizarrely-shaped and patently offensive racial classification which so clearly subordinated traditional districting principles.

The subordination of compactness is obvious from the narrow "western connector" which winds outside the City of Chicago, only to wind back again to tie together the two dispersed Hispanic populations within Chicago. The "connector" does not merely indicate racial intent when it segregated Hispanics from white and African-American populations, but indicates the limitless application of computer technology to advance the interest of race-based politics in Chicago. The subordination of respect for political subdivisions is evident in District 4's "western connector" which split two precincts thereby reducing them to a level of merely 1 and 2 voters such that District 4 likely deprived those voters of ballot secrecy. The use of block-by-block racial data to separate most of the highest percentages of Hispanic census blocks from white and black populations not only resulted in a fifty-two percent (52%) split of voting precincts in 1991, but also created a continuous "ragged" border for District 4, that like the "western connector", indicates that even if a reasonably compact district could have been created for Hispanics, District 4 was not narrowly-tailored because "nothing in §2 requires the race-based creation of a district that is far from compact." *See, Bush*, at ___, 116 S.Ct., at 1961. Section 2, however, does not authorize a federal court to uphold a district which was far from being narrowly-tailored. Clearly District 4's lack of narrow-tailoring resulted, and continues to result, in the patently offensive effect of "perpetuating such notions" that persons of the same race "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630. 113 S.Ct. 2816 (1993).

This strict scrutiny analysis, however, presumes that the lower court had a "strong basis" to find that some sort of remedy was appropriate, even if it were not a minority-majority district in the form of District 4. But the evidence in the case indicates, and is supported by the findings of the lower court, that both a "connector" and block-by-block drawing were required to draw any type of remedial §2 district for Hispanics, irrespective of the configuration of any of the three African-American §2 congressional districts. Therefore, this is a case where "because of the dispersion of the

minority population, a reasonably compact majority-minority district cannot be created, [and] §2 [did] not require a majority-minority district." *See, Bush* at ___, 116 S.Ct., at 1961.

Thus, prior to evaluating whether District 4 could be narrowly-tailored, the lower court was in error to find Hispanics "sufficiently compact" under *Gingles* where the evidence shows extensive dispersion of the Hispanic population in Chicago. Additionally, the citizenship data casts doubt that Hispanics were "sufficiently numerous" under *Gingles*. And, under the third prong of *Gingles*, the lower court relied upon an analysis of electoral races by the Defendants which showed, among other things, that a candidate of choice of Hispanics won in 27 of 41 elections, and revealed only three elections which, as a matter of law, assertedly constituted legally sufficient white racial bloc voting. On these bases alone District 4 did not meet the threshold factors of *Gingles* and the lower court did not properly apply strict scrutiny. Lastly, the lower court found a sufficient presence of the *Zimmer* factors, relying upon the *Hastert* court's findings gleaned from two dated cases to support its finding of a "strong basis in evidence". These cases, *Rybicki v. State Board of Elections*, decided in 1982, and *Ketchum v. Byrne*, decided in 1984, both decided more than thirteen (13) and eleven (11) years from the trial in the instant case, each discussed evidence which was stale and, therefore, insufficient to show the presence of the *Zimmer* factors such that under the "totality of the circumstances" Hispanics were entitled to a finding of a violation of §2 in December 1995. For these reasons, the lower court did not properly apply strict scrutiny to the racially gerrymandered District 4, and the lower court's decision should be overturned.

ARGUMENT

I. District 4 Was Not Narrowly-Tailored Because The Excessive Splitting of Precincts and Neglect of Any Compactness Standard Resulted in Significant Deviations from Traditional Districting Principles.

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[2] Townships: District 4 splits eight (8) townships, other districts split a greater or equal number, District 3 (9), District 6 (8). Cities: District 4 splits eighteen (18) cities, where other districts split a greater or equal number of cities, District 6 (27), District 11 (26), District 13, (23), Districts 3 and 8 (22). Cleveland Report, App. 86.

When the lower court applied strict scrutiny, it was required to determine whether District 4 was "narrowly-tailored" to the compelling state interest of avoiding liability under §2. *Shaw II* at ___, 116 S.Ct., at 1905-1906. District 4, however, went clearly beyond the goal of avoiding liability under §2, *see, id.*, when it "subordinate[d] traditional districting principles to race, substantially more than [was] 'reasonably necessary' . . . ." *Bush*, at ___, 116 S.Ct., at 1961.

A. Excessive Splitting of Voting Precincts.

The lower court found that the 4th Congressional District split a number of political subdivisions: eight (8) townships, eighteen (18) municipalities, including the City of Chicago, twenty (20) aldermanic wards and 218 voting precincts. Opinion 1, App. 45. Throughout the State of Illinois, there are several other congressional districts which split a greater or equal number of counties, townships, and cities than did District 4, but no congressional district split the number of voting precincts to the degree in District 4.[2]

On the basis of the evidence of split political subdivisions, other than voting precincts, the lower court in its reconsidered opinion did not think that District 4 excessively split local political subdivisions, saying:

> [in its earlier opinion this court] held that the data permit "the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions" *Id.* While uncertain, this conclusion offers support that the Fourth District is "reasonably compact" when viewed in comparison to other Illinois congressional districts and therefore should not be disregarded.

Opinion 2, App. 72, n.5. The congressional districts which split a greater number of these types of political subdivisions, however, Districts 3, 6, 8, 11, and 13, are larger districts with dispersed population, unlike District 4 which is urban. A district's failure to split county and municipal lines is "unremarkable in the context of large, densely populated urban counties." *Bush*, at ___, 116 S.Ct., at 1954.

District 4 split precincts, however, to a degree far greater than other congressional districts. District 4 split 218 precincts at the time of its creation, more than double the 111 split precincts in the

next closest congressional district, District 5, which shares a border with District 4. The excessive splitting of precincts is particularly telling of the disrespect for local political subdivisions in the City of Chicago, and where the boundaries of District 4 go outside of Chicago, in Cook County. Illinois law provides that in Chicago, the election precincts are to "contain nearly as practicable 600 voters". Illinois Compiled Statutes Ch. 10, Sec. 5/11-3 (West 1994), App. 76. In Cook County, the area surrounding Chicago, the county board is to "divide its election precincts into "election districts so that each shall contain, as near as may be practicable, 500 voters." *Id.* at 5/11-2. District 4 did not respect this traditional districting policy embedded in state law.

It is not insignificant that District 4 split a substantial number of precincts which is an indication of the split of neighborhoods, community areas, school zones, parishes, and other "non-racial bases of political identity." *See, Bush* at ___, 116 S.Ct., at 1962. The lower court, however, did not adequately weigh this significant deviation from traditional districting criteria in asking whether it was compelled to uphold District 4. The excessive splitting of precincts caused administrative difficulties, including probable loss of ballot secrecy in several precincts that were split to small population levels, in addition to inconvenience to a substantial percentage of voters, each of which shows the pervasive effects of subordinating the principle of maintaining the integrity of voting precincts to race.

Precincts within the "western connector" were split to such low population levels, that the ballot secrecy of at least three Cook County voters was likely compromised in the 1994 general election for U.S. Representative for the 4th Congressional District. These voters, only two (2) of whom were in Stickney precinct 40, and only one (1) in Proviso precinct 132, can be identified by matching the poll books to the canvass of election results. Lewis Test. App. 89, Selected Precinct Election Results, App. 90. *See, Bush*, at ___, 116 S.Ct., at 1959 (similar concern). *Cf.* Illinois Compiled Statutes, Ch. 735, Sec. 5/8-910 (West 1994) App. 81 (traditional districting principle of ballot secrecy).

The evidence submitted by the Defendants in the form of an Affidavit of Robert Sawicki, App. 110, reveals how the split of so many precincts by District 4 was not consistent with the policy of the Chicago Board of Election Commissioners (hereinafter "CBEC")

to avoid multi-district precincts, App. 110 (¶6), and that administrative irregularities resulted: 1) since 1992 (at the creation of the Fourth Congressional District) the CBEC assigned two additional poll judges in multi-district precincts, App. 110 (¶6); and 2) at the time of the '92 primary elections there were 400-450 multi-district precincts. Sawicki Affidavit, App. 111 (¶10). These administrative headaches can be considered further evidence of subordination of the principle of maintaining the integrity of political subdivisions. *See, Bush* at ___, 116 S.Ct., at 1959 (an increase in the number of precincts from 672 to 1,225 to accommodate new congressional boundaries, resulting in administrative headaches, was relevant to violation of traditional districting principles). The excessive number of split precincts in District 4 caused inconvenience to voters, where 52% of the precincts which District 4 touched were split. Percentage of Population in Split Precincts, App. 87. The next highest, the Fifth Congressional District, split 19% and shares a significant border with the District 4. *Id.* The Plaintiff's evidence also showed that approximately 21% of the population of the District 4 lived in a split precincts after the creation of District 4 with the next highest being the Fifth Congressional District again, at 11%. *Id., Cf. Bush*, at ___, 116 S.Ct., at 1959 (where 60% of a districts residents live in split precincts this "exhibit[s] utter disregard of city limits, local election precincts, and voter tabulation district lines.") Therefore, the lower court erred in finding that District 4 did not excessively split political subdivisions.

B. The Lower Court Ignored the Traditional Districting Principle of Compactness.

Upon reconsideration the lower court found that District 4 is compact saying that "this court [in its earlier opinion] also rejected the argument that its bizarre shape belies compactness" and, in support of this argument, cites to various evidence. *See*, Opinion 2, App. 70. This evidence, however, points to the opposite conclusion. It goes beyond reason, for example, and contradicts this Court's precedents, to find that "block-by-block" drawing indicates compactness, as is asserted by the lower court. Opinion 2, App. 70.

The lower court's finding of compactness in its reconsidered opinion, moreover, contradicts the lower court's original finding that District 4 was not compact:

this court must conclude that compactness was not

> considered [by the Hastert court] in the configuration of the Fourth Congressional District. In any event, this court finds that the Fourth Congressional District is not visually compact. In addition, unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact either.

Opinion 1, 43, n.48 (citations omitted). *See, also, Hastert* at 648, n.24. The evidence supports the lower court's original finding that District 4 was not compact. Under Illinois state law District 4 would not be considered compact. *See, Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 98, 430 N.E.2d 483, 487 (1981).

The "Western Connector". The most visible aspect of District 4 which contributes to its non-compactness is the what the court has termed the "western connector". It winds a narrow path out of the City of Chicago to the border of DuPage County only to wind back again into the City of Chicago to tie together the northern and southern Hispanic populations. Where the "connector" went through populated areas, the mapmakers consistently sought out the highest percentages of Hispanic population. Cleveland Test., App. 82, *see, also*, Hispanic population in the Townships of the "Western Connector", App. 83, *and* Opinion 1, 44 ("Portions of the western connector are also explainable only on racial grounds"). The non-populated portions of the "western connector" contain a "significant amount of vacant land, park land, cemeteries and industrial areas . . . to ensure the district's contiguity." Opinion 1, App. 44 n.49.

The lower court attempts to sever consideration of the "western connector" from consideration of District 4 as a whole, arguing that it can look at the configuration of the northern and southern populations of District 4 without considering the legal significance of the "western connector"; and, indeed, the lower court's opinions do not consider it legally significant in its analysis. Without the "western connector", however, District 4 would not be contiguous[3] and, therefore, District 4's contiguity depends upon the "western

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[3] Even the lower court acknowledged that "[t]his contiguity, however, is 'hypertechnical[] and . . . cynical[]" *see Hays v. State of LA*, 839 F.Supp. 1188, 1200 (W.D. La 1993), since it is preserved through the use of non-populated parks and barren industrial areas." Opinion 1, App. 44 n.49.

connector" for its legal existence. Indeed, the northern and southern parts of District 4, which make up 95.30% of its population, are not contiguous, and this makes the "western connector" a necessary part of District 4's configuration. And as stated above, it is also indicative of the dispersion of the Hispanic population such that Hispanics could not have been found to meet the first threshold condition of geographic compactness under *Gingles* in the first place. *See*, discussion, *supra* at __.

Further, the drawing of a "connector" around the African-American population was itself a "predominant[] racial reason[]". *See, Bush* at ___, 116 S.Ct., at 1970. *See, also*, Population Between the "Islands" of Hispanic Population, App. 100. Therefore, whether its called a "connector" or "land bridge", *see, Miller v. Johnson*, 515 U.S.___, ___, 115 S.Ct. 2475, 2488-89, it dramatizes the "subordinat[ion of] traditional districting principles to race substantially more than is 'reasonably necessary'. . . ," *see, Bush*, at ___, S.Ct. at 1961, and "cause[s] constitutional harm insofar as [it] convey[s] the message that political identity is, or should be, predominantly racial." *Id.*, at ___, S.Ct. at 1962. The use of such a lengthy, narrow, winding, and multidirectional "connector" so excessively violates the traditional districting principle of compactness so that District 4 was not "narrowly-tailored".

"Block-by-Block" Drawing of the Boundaries of District 4. Review of the map indicates that the Hispanic populations were carefully segregated from adjacent white and African-American populations and that the lines "were drawn to maximize the percentage of Hispanics located within the district. . . . " and with "exquisite detail". Opinion 1, App. 43. The lower court said census block data,

> permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district. As a result, when a map of the Fourth Congressional District is superimposed over a map showing the concentration of the Hispanic population drawn at the census tract level, the district map "includes virtually all areas of high percent Hispanic concentration on the northern . . .part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago.

Opinion 1, App. 43. The use of "block-by-block" racial data, in conjunction with "direct evidence of racial considerations" is

"substantial evidence that it [is] race that [leads] to the neglect of traditional districting criteria . . . ." *Bush* at ___, 116 S.Ct., at 1953. In contrast to *Bush*, the lower court, however, considers this evidence to support the opposite legal conclusion. *See,* Opinion 2, App. 70-72.

The Northern & Southern "Appendages". This block-by-block segregation of Hispanic populations from white and African-American populations continues throughout what the lower court calls the "appendages" or "promontory" points of District 4. The lower court found that these portions were also drawn on the basis of race, relying upon the *Hastert* court's statement that

> [t]o ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Opinion 1, App. 44. (emphasis in original), *see, also,* Hispanic VAP Census Map w/District 4 Overlay, App. Attachment. The "appendages" are further evidence of the unreasonable subordination of traditional districting principles to the consideration of race. And, like the "western connector" the "appendages" also indicate the dispersion of the Hispanic populations.

Even if the Plaintiff were to concede that lower court had a "strong basis in evidence" to find a violation of §2, the lower court failed to properly apply strict scrutiny because it was unreasonable to uphold a district which was not "reasonably compact" nor "maintain[ed] . . . traditional boundaries", *Bush* at ___, S.Ct. at 1960. The lower court was obligated to determine whether District 4 was narrowly-tailored to the meet the state's compelling interest in complying not only with §2, but also with the equal protection concerns that this Court has raised in the cases of *Shaw I, Miller, Bush,* and *Shaw II.* In other words, whether a districting plan is judicially or legislatively enacted, it must be narrowly-tailored to meet a compelling state interest to comply with the Equal Protection Clause, not merely an expansive view of §2 of the Voting Rights Act.

II. THE LOWER COURT LACKED A "STRONG BASIS IN EVIDENCE" TO FIND THAT THERE WAS A VIOLATION OF §2.

When applying strict scrutiny to a majority-minority district created under §2 of the Voting Rights Act a court must first ask if there was a "strong basis in evidence" for finding a violation of §2; and in particular whether a defendant has shown the presence of the three threshold conditions of *Gingles*. *Bush v. Vera*, 517 U.S. ___, ___, 116 S.Ct. 1941, 1961 (1996). The lower court adopted the evidence in the *Hastert* case to support its finding that the three threshold conditions of *Gingles* were met. Opinion 2, App. 67-68 (adopting findings by *Hastert* court set forth at Opinion 1, App. 23-24), *see, also*, Opinion 1, App. 47-53. It consequently found that there was a "strong basis in evidence" to find a violation of §2. Opinion 1, App. 54.

A. Geographical Compactness and Numerousness of Hispanics

1. Geographical Compactness

The lower court found, first, that the Hispanic population in Chicago and Cook County was "sufficiently numerous and geographically compact." The lower court based its findings almost exclusively upon the following evidence from *Hastert*.

> (1) "the Hispanic population of Chicago now totals 545,852, and increase of 29.33% over the 1980 count of 422,052."
>
> (2) "Most of the Chicago/Cook County Hispanic population is clustered into two dense enclaves, one on Chicago's near northwest side and another on the near southwest side."
>
> (3) "The two separate Hispanic population clusters are less than a mile from each other at their closest points."
>
> (4) "The separation of the clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers."

Opinion 1, App., 23, *Hastert* at 649. As an additional basis to support the finding of compactness of the Hispanic population, apart from the evidence in *Hastert*, the lower court said in its original opinion that

> a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic population within the City of Chicago. This rectangle serves as evidence of the Hispanic community's geographic compactness.

Opinion 1, App. 43, n.48. Based upon this evidence the lower court "accordingly conclude[d] that the *Hastert* court's finding of geographic compactness was appropriate." Opinion 1, App. 53.

First and foremost, the lower court's "hypothetical rectangle" cannot possibly show that the Hispanic population was compact, but actually serves to show their non-compactness since such a rectangular district would be twice as populous and half the percentage of Hispanics as are currently in District 4. And, further, a rectangle could as easily be drawn around any non-compact area, such as North Carolina's District 12.

Second, simple review of the residential patterns of the Hispanic population indicate that the Hispanic population is not sufficiently compact, but dispersed. *See,* Hispanic VAP Map, App. Attachment. The non-compactness of the Hispanic populations is evident from the statement of the Defendant's own witness that "[j]oining Cook County's north/south Hispanic populations by the use of a connector is necessary in order to create a majority Hispanic congressional district." Affidavit Testimony of Aguillon, App. 84. Besides the "connector" actually used, all of the alternative plans in the record indicate the use of a "connector" or "land bridge" of some sort was necessary to maintain contiguity between the northern and southern Hispanic populations. *See,* Illinois Latino Committee for Fair Redistricting Maps from Aguillon Affidavit ("Middle Connectors"), App. 111, 112. *Compare,* Taylor Report, Map 2: Latino Plurality Block Groups, App. 99, *with* Hispanic VAP Map, App. Attachment. This is evidence of the dispersion of the Hispanic population.

In *Shaw v. Hunt* this Court held that North Carolina's District 12 did not "remedy the anticipated violation" when it stated that

> [n]o one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. . . . Therefore, where that district sits, "there neither has been a wrong nor can there be a remedy" *Growe, supra* at 41, 113 S.Ct., 1t 1084.

Shaw, at ___, 116 S.Ct., at 1906, *see, also, Bush* at ___, 116 S.Ct., at

1961 ("District 30 . . . reaches out to grab small and apparently isolated communities which . . . could not possibly form part of a compact majority-minority district. . . .") Likewise, in this case, the residential patterns show that Hispanics were dispersed to such a degree within the dense urban setting of Chicago such that it was error for the lower court to find the Hispanic population was "sufficiently" compact.

*2. **Numerousness.***

At trial the Plaintiff asserted that Hispanics were not numerous enough because those of non-Puerto Rican ancestry have very low citizenship rates. After citing *Johnson v. DeGrandy*, and *Growe v. Emison*, in which this Court declined to rule on the issue, the lower court said

> [t]his court too declines to resolve this question since King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent. Hence, . . . the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion.

Opinion 1, App. 50, Opinion 2, App. 69. As a matter of law, however, it is entirely inconsistent for the Voting Rights Act to protect persons who, because of lack of citizenship, cannot vote to "elect representatives of choice", particularly when "elect[ing] candidates of choice" is a legally significant element in a §2 claim. *Voting Rights Act*, §2, *Gingles*. Further, the Voting Rights Act expressly says "citizens" in both sections 2(a) and 2(b). *See, Voting Rights Act*, 42 U.S.C. 1973, Appendix, 75. Therefore, when there are not enough potential citizen voters in order to obtain a citizen voting age population in excess of 50%, the first *Gingles* threshold cannot be met and "there neither has been a wrong nor can there be a remedy." *See, Shaw II*, at ___, 116 S.Ct. at 1906.

In the instant case, the lower court clearly confused the testimony regarding the percentage of **district citizens who are Hispanic** with census data regarding the percentage of **Hispanics who are citizens**, which constitutes clear error. Opinion 1, App. 50. The Plaintiff's expert, Mr. Cleveland, testified from census data that no more than 45% of the citizens in the district were of Hispanic heritage and that

the percentage "is actually considerably lower than that" because there is a "problem [of] overreporting of citizenship among Hispanics". Cleveland Test., App. 93, *see. also,* Cleveland Report, App. 91. The lower court mistakenly suggests in footnote 58 that Cleveland's testimony is inconsistent with census data showing 56.3% of all Hispanics in Chicago are citizens. In fact, Mr. Cleveland's testimony was consistent with the census data: 56% of all Chicago Hispanics are citizens. Cleveland Test., App. 93.[4]

The lower court also suggests that Cleveland's calculations "did not compensate for amnesty programs." The record clearly indicates that the amnesty programs did not result in more than 14,033 persons of Latino background being granted citizenship in Chicago between the years 1991 through 1994, which constitutes only a 2% increase when compared to the population of District 4 (571,530). Moreover, these data cover the City of Chicago, not just District 4. *See,* Taylor Declaration, App. 98. Therefore, an increase of 2% over 45% still does not amount to greater than the 50% needed to be sufficiently numerous under *Gingles*. Therefore, the lower court did not have a "strong basis in evidence", either by way of the *Hastert* court or other evidence, to uphold District 4 since Hispanics were not shown to be sufficiently numerous.

B. The Lower Court's Findings of Racial Bloc Voting do not support the finding of a Strong Basis in Evidence.

In this particular instance, the lower court found, apart from the findings of the *Hastert* court, that white racial bloc voting exists. The lower court found "a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." Opinion 1, App. 51-52. The court relied upon the evidence presented by Dr. Lichtman, the expert for the Defendants, and in particular his statement that "'since 1987, Hispanics have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority.'". Opinion 1, App. 52.[5]

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[4]Other evidence at trial confirmed this view, including evidence of the Defendant-Intervenors. See, Al Filo App. 96 (in 1986, 44% of all Chicago Hispanics were ineligible to vote); Latino Institute, App. 97 (59.4% all Illinois Hispanics are citizens); MCIC Table, App. 98 (61% of all Metro Chicago Hispanics are citizens).

[5] This quote of Dr. Lichtman's is taken out of context by the lower court because Dr. Lichtman's testimony was that, indeed, Hispanics could not be elected in any district lacking an Hispanic majority, but indicated that he did not include the city-

Put very simply, this is not the test. Under *Gingles*, the definition of legally significant white racial bloc voting is whether "the white majority votes sufficiently as a bloc to enable it . . . *usually to defeat* the minority's preferred candidate." *Gingles*, at 51, 106 S.Ct., at 2766-67 (emphasis added). This Court has not in any way detracted from or amended that standard and, in fact, requires it for establishing a "strong basis in evidence" under strict scrutiny. *See, E[illegible]h*, at ___, 116 S.Ct., at 1961.

White racial bloc voting entails three operative considerations in determining whether an electoral race is proof of racially polarized voting: first, *a priori*, a minority group, by a majority of the minority group's votes, selects a "candidate of choice"; second, the minority's candidate of choice must be defeated; and third, the white vote is sufficient to cause the minority's candidate of choice to lose. Under this standard, only three (3) of the elections analyzed by Dr. Lichtman may be reasonably construed as white racial bloc voting.

Dr. Lichtman analyzed a total of 41 elections. Of that number there were a total of 27 elections in which the Hispanic candidate of choice won an election. In twenty-two (22) of races the Hispanic candidate of choice was Hispanic. In another five (5) of the elections, the Hispanic candidate of choice was white.

Of the remaining fourteen (14) elections analyzed, the Hispanic candidate of choice lost. With the exception of the three (3) legally sufficient races,[6] there are various reasons other than white racial bloc voting which explain the losses. There are four (4) races in which the Hispanics constituted a majority percentage in the relevant district, but were unable, likely due to low turnout, to elect their candidate of choice.[7] In another two (2) elections there was substantial white support, and the voting behavior of the black voters

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wide elections of Santos as City Treasurer, and of two judges elected city-wide in 1988 and 1990. The City of Chicago is not majority Hispanic.

[6] 1987 Primary City Clerk Election, with 93 percent of whites voting against the Hispanic candidate of choice; 1992 Primary Ward Committee District 12 Election, with 88 percent of whites voting against Hispanic candidate of choice, with 56% support from Blacks for the Hispanic candidate of choice; and 1990 Primary State Representative District 21, with 90% of whites voting against the Hispanic candidate of choice, in conjunction with 50% of vote from Blacks for Hispanic candidate.

[7] 1983 Primary Alderman Ward 25, Hispanic population was at 66 percent Hispanic

1984 Primary Ward Committee 25, Hispanic population was 67 percent Hispanic

in the district likely had more influence on the election than white voters.[8] In another four (4) elections, the data was not complete enough to permit the conclusion that whites voted sufficiently as a bloc to defeat the Hispanic candidate of choice.[9] In another election, the lack of cohesion of the Hispanic vote contributed to the loss of the Hispanic candidate of choice.[10]

Once the relevant electoral races have been discovered, a court must evaluate if bloc voting "usually defeats the minorities' preferred

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1984 Primary Ward Committee 31, Hispanic population was 54 percent Hispanic

1994 Primary Judge 6th Circuit, Hispanic population was 51 percent Hispanic.

[8] 1990 Primary State Representative District 35, a white candidate won with 58% of the white vote and 98% of the black vote; white voters thus supported the Hispanic candidate of choice with 42% of the vote. Likewise, in 1986 Primary U.S. Congressional District 2, a black candidate won with 100% of the black vote; 80% of white voters voted for the Hispanic candidate of choice.

[9] 1988 Primary Ward Committee District 10: in this race, although 98% of white voters voted for the winning white candidate, 86% percent of Blacks supported the winning white candidate, in addition to 90% of non-Hispanics, and without detail as to the ethnic make-up of the district, there is not enough evidence to say that whites voted sufficiently to defeat the Hispanic candidate of choice. Dr. Lichtman's report states that this district 10 is 22% Hispanic, 27% Black, but does not say what percentage is White. One can only presume "other" which would include Asians, and other ethnicities.

1991 Primary Aldermanic Ward 10: in this race, although 89% of whites voted for the white candidate over the Hispanic candidate of choice, 99% of blacks supported the white candidate. Like District 10 above, the percentage of white voters in the district is unknown, while Dr. Lichtman states in his report that it is 24% Hispanic, 28% Black, leaving another 48% "other" without definition.

1983 Primary Aldermanic Ward 7 Runoff: in this race Dr. Lichtman states in his report that white voting behavior is not available (i.e. "N/A"), therefore, in a district which 61% Black, 29% Hispanic, and thus only 10% "other", it is unconclusive to say that whites, even if they were up to 10% of the percentage of the district, that they voted sufficiently to defeat the Hispanic candidate of choice. The only candidates in this race were an Hispanic and Black.

1987 Primary Aldermanic Ward 7: in this race Dr. Lichtman states in his report that white voting is not available (i.e. "N/A"). In addition, in a district which was 65% Black and 25% Hispanic, and thus only 10% "other", it is unconclusive to say that Whites, could have voted sufficiently to defeat the Hispanic candidate of choice. The only candidates in this race were Hispanic and Black.

[10] 1983 Primary Aldermanic Ward 33: in this race, 55 percent of Hispanics selected the Hispanic candidate, leaving 45 percent selecting the white candidate. Further, the data is incomplete with respect to white voting behavior, as Dr. Lichtman's report states "N/A" as to the percentage of Anglo voters for Hispanic candidate.

candidate." *Gingles*, at 51, 106 S.Ct., at 2766. The Seventh Circuit recently interpreted this to mean "*consistently* defeat minority candidates". *NAACP v. Thompson*, No. 96-3315, slip op. at 5, (7th Cir. July 3, 1997), (emphasis added), *citing*, *Gingles* at 100, 106 S.Ct. at, 2792 (O'Connor, J. concurring) (the third prong of *Gingles* will be met where "bloc voting by white voters will consistently defeat minority candidates.") and, further, held that winning "a few [elections] is enough to negate the third element of the threshold showing under *Gingles*." *Id.* (citing *Abrams v. Johnson*, U.S.L.W. at 4491-93.). In *NAACP*, the court found that in contested elections between blacks and whites that the election of a black candidate in 7 of 16 elections was not a showing by the plaintiffs that whites "consistently" bloc voted against the minority. *Id.* at 7. Where an analysis of the races presented by Dr. Lichtman, and relied upon by the lower court, established that there were only three (3) legally significant instances of racially polarized voting under *Gingles*, out of a total of forty-one (41) elections analyzed and, further, where Hispanics' candidates of choice have won more than a "few" elections, there was no "consistent" loss. As the data show, Hispanic candidates of choice won in 27 out of the 41 elections. Therefore, based upon this review of the evidence, there was no "strong basis in evidence" for the lower court to find that the Defendants met their burden under the third prong of *Gingles* to justify upholding District 4.

C. Presence of the *Zimmer* Factors.

Even if this Court were to find that it was not error for the lower court to determine that there was a "strong basis in evidence" to find the presence of the *Gingles* threshold conditions, this would still be insufficient to uphold District 4 under §2. There also must be a finding of the presence of the *Zimmer* factors, probative of the ultimate finding under the "totality of the circumstances," that there is a "strong basis in evidence" for a §2 violation. A minority group must show in light of the *Zimmer* factors that the minority group has "had less opportunity than other members of the electorate to participate in the political process". *DeGrandy*, at __, 114 S.Ct., at 2657 (citing *Gingles* at 46, 79-80, 106 S.Ct., at 2674, 2781-2782; *id.*, at 98-99, 106 S.Ct., at 2791-2792 (O'Connor, J. concurring in judgment). This is a separate and distinct showing from showing that the minority group has had a "lack of electoral success". *See,*

DeGrandy, supra. The *Zimmer* factors are "neither comprehensive nor exclusive", *Gingles* at 45, 106 S.Ct., at 2763, and are "probative" of a violation, *id.* at 36, 106 S.Ct., at 2759, or in the case of a court approved plan, probative of whether a "violation of §2 would occur in consequence of a court's plan". *Abrams v. Johnson*, ___ U.S. ___, 117 S.Ct. 1935. The Defendant-Intervenors had the opportunity to present evidence under *Zimmer* not only from the *Hastert* litigation, but supplement that evidence.[11]

The lower court found that "prior judicial determinations . . . of electoral discrimination against the Hispanic community" in *Ketchum v. Byrne*, 740 F.2d 1398, (7th Cir. 1984) and *Rybicki v. State Board of Elections*, 574 F.Supp. 1082 (N.D.Ill. 1982), were sufficient for the *Hastert* court to have had a "strong basis in evidence" to conclude a §2 remedy was required. Opinion 1, App. 54. It is important to note that with respect to a trial in December 1995, the lower court relied upon prior judicial determinations for findings of fact, already previously made by the *Hastert* court, that arose in 1982 (*Rybicki*) and 1984 (*Ketchum*), which were eleven (11) and thirteen (13) years old respectively.[12] The record in this case discloses that the process of registering to vote, the process of getting to the polls, or the process of registering as a candidate was never challenged by the Defendants or Defendant-Intervenors. *See, also, DeGrandy*, at __, S.Ct., at 2660 (evidence which may establish a violation include "such reprehensible practices as ballot box stuffing, outright violence,

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[11] The lower court asserts that the Plaintiff did not contest the findings of the *Hastert* court under the "totality of the circumstances". The Plaintiff maintained that proof of this was proper at the trial in this case. Additional Trial Brief of Plaintiff, App. 102, ("In respect to the other findings of the *Hastert* court, for example, on past discrimination against Hispanics, the applicability of *stare decisis* does not preclude the Plaintiff from having his day in court, wherein the Defendants must make their showing.") Further, the Plaintiff never stipulated to any fact relevant to *Zimmer*. A letter sent to counsel for both MALDEF and the Department of Justice indicated that the Plaintiff would not be stipulating to facts relating to the "totality of the circumstances."

[12] Indeed, if the lower court were to find that "prior judicial determinations" were binding, it should have also taken into account a voting rights case concerning judicial districts, *Williams v. State Board of Elections*, 718 F.Supp. 1324 (N.D.Ill. 1989) a case which, unlike *Ketchum* and *Rybicki* was only two years prior to *Hastert*, and in which Hispanic plaintiffs in that case were found by that court to have produced "no evidence to support the allegation that white bloc voting usually results in the defeat of judicial candidates they prefer." *Williams* at 1329.

discretionary registration, property requirements, the poll tax, and the white primary. . . ."). Nor was it asserted that any prior congressional districting plan unlawfully diluted the votes of Hispanics. The record does not establish that the method and practices of electing members of congress from Illinois was other than non-discriminatory. The lower court was unable to cite to any evidence, and the record simply does not establish outside of the "prior judicial determinations", that Hispanics, at the time of this litigation in December 1995, nor any prior time relevant to the litigation in December 1995, had "less opportunity to participate in elections" under the "totality of the circumstances" and, therefore, the lower court did not have a "strong basis in evidence" to find that there was a violation of §2 in respect to Hispanics.

III. There Was No Compelling State Interest to Either Create or Uphold District 4 by Reason of Any Perceived Need to Maintain Surrounding African-American §2 Districts Under the Principle of Non-Retrogression.

The lower court maintains its assertion upon reconsideration that District 4 is narrowly-tailored because District 4's "extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression". See, Opinion 1, App. 57, Opinion 2, App. 66-67. There is no compelling interest to avoid retrogression in a jurisdiction not covered by §5. Further, there was no evidence that District 4 was "narrowly-tailored" to the considerations of non-retrogression, and there was little evidence at trial indicating that inclusion of some Blacks in an Hispanic district or some Hispanics in a Black district would prevent the election of candidates of choice of either.

This Court has asserted the priority of traditional districting principles over nonretrogression:

> [w]e do not read *Beer* or any of our other §5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression.

Shaw v. Reno, 509 U.S. 630, 655, 113 S.Ct. 2816, 2831 (1993). Moreover, a choice must be made between two mutually exclusive remedies so as not to violate the Equal Protection Clause. *See, Bush*, at ___, 116 S.Ct., at 1972 (Kennedy, J., concurring) ("Section 2 does not require the State to create two noncompact majority-minority

districts just because a compact district could be drawn for either minority independently"), *see, also, DeGrandy v. Wetherell*, 815 F.Supp. 1550, 1582-83 (N.D. Fla. 1992) (Vinson, J. concurring). Thus, where a "reasonably compact" district could have been drawn for the Hispanics by the *Hastert* court ***but for*** the concerns of maintaining §2 African-American districts,[13] §2 did not require drawing District 4 for Hispanics. Moreover, neither the lower court, nor the *Hastert* court, considered influence districts as a remedy under these circumstances. *See, e.g., Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096, 1101 (W.D. Tenn. 1995) *aff'd. sum nom, Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, ___ U.S.___, 116 S.Ct. 42 (1995).

IV. The Lower Court Had No Basis to Bind the Plaintiff to the Decision of *Hastert* by Modifying Rule 60(b) or Otherwise.

A. Plaintiff's Case Was Not a "Challenge" to the *Hastert* Decision.

In reviewing the evidence, the lower court imposed the standard of review of "clear error" as if the Plaintiff were seeking to modify an order under Federal Rule 60(b):

> [This] court therefore adopted the standards that *would have applied had King sought to modify the Hastert order under Rule 60(b)*.... To demonstrate that the *Hastert* court erred in making a specific finding of fact, *King has to establish that the court committed clear error. See Fed. R. Civ. P. 52(a)*

Opinion 1, App. 14 (footnotes omitted) (emphasis added). The lower court added that as part of its "clear error" burden the Plaintiff may also show that there was "a controlling or significant change in factual circumstances." Opinion 1, App. 14. And, further, despite language

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[13] It is not conceded by the Appellant that any of the African-American district were justified under §2. The Appellant, however, did not have standing to challenge those districts. There has been no showing that reduction of a district from 65% to some lower level in a multiethnic district would prevent candidates of choice of black voters from winning.

to the contrary,[14] where the lower court did not review any of the Plaintiff's evidence other than to establish "clear error" in *Hastert*,[15] this indicates that the lower court considered the Plaintiff's claim exclusively a challenge to the *Hastert* decision. *See,* Opinion 1, App. 14 ("King's lawsuit is at its very core a challenge to the *Hastert* court's order") *and* Opinion 1, App. 12 (The Plaintiff's "complaint both directly and indirectly challenged the *Hastert* court's findings of fact and judgment.")

In viewing King's claim as a "challenge" to the *Hastert* decision, the court characterizes King's claim against District 4 as follows:

> King proffers three "powerful reasons" warranting reexamination of the *Hastert* court's findings of fact and conclusions of law: first, the governing law has changed as a result of the Supreme Court's decisions in *Shaw* and *Miller*; second, certain factual findings made by the *Hastert* court were clearly erroneous; and third, the facts have changed since November 1991.

Opinion 1, App. 17. On the contrary, the Plaintiff's position was that, as a non-party to the *Hastert* proceeding, he was entitled to a *de novo* review of the evidence as in any civil action.

The evidence in *Hastert* was relevant to this case not only because the *Hastert* court approved District 4 but also because it found that the presence of the threshold conditions of *Gingles* and of the *Zimmer*

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[14] "[T]he *Hastert* court's conclusion that the district's extraordinary configuration was necessary to 'satisfy constitutional principles' is rendered circumspect by the change in governing law and is therefore subject to *de novo* review." Opinion 1, App. 25; "Since the *Hastert* court did not analyze whether the oddly drawn Fourth Congressional District met the requirements of the Equal Protection Clause, a presumption of constitutionality does not arise and no deference is accorded to the *Hastert* court on this issue." Opinion 1, App. 27.

[15] The lower court's findings in the case under strict scrutiny were as follows: "the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district." Opinion 1, App. 50. "King has thus failed to establish that the *Hastert* court's finding of political cohesiveness was clearly erroneous." Opinion 1, App. 50-51. "The *Hastert* court thus properly found that the third *Gingles* factor was satisfied in 1991, and King has not established any present day change in circumstances that would warrant a contrary finding." Opinion 1, App. 52. "The *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act." Opinion 1, App. 53. "[T]his court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan." Opinion 1, App. 56.

factors established a violation of §2. The Plaintiff, however, as a non-party to *Hastert*, should never have been bound to the weight that the *Hastert* court assigned to that evidence. The weight and sufficiency of the evidence in *Hastert* should have been tested afresh by the King court in the King case; it should have been subject to the crucible of litigation between parties in fact adverse. This is critical because not only was King not a party to the *Hastert* litigation, but also because the creation and configuration of District 4 was never contested nor actually litigated in *Hastert*. The Plaintiff, as well as the Defendants, delved into the record of *Hastert* and had various witnesses testify in the King trial who participated in *Hastert* either as a witness and/or submitted an affidavit in support of creating District 4; in addition, the parties in the King case stipulated to different portions of the evidence in *Hastert*. Therefore, the weight and sufficiency of the evidence admitted in *Hastert*, in addition to the other evidence admitted by the parties in the instant case, was to be judged independently by the lower court without reference to the weight that the *Hastert* court assigned to its evidence.

Moreover, the evidence submitted clearly shows that the Plaintiff did not merely contest the findings of *Hastert* and that the Defendants did not consider their defense limited to buttressing the findings of *Hastert*, since both the Plaintiff and Defendants submitted evidence which was relevant to the time period subsequent to the *Hastert* decision. The Defendants submitted evidence from Dr. Lichtman's report of 16 elections covering the period from 1992 until 1995, Opinion 1, App. 52, while the Plaintiff supplemented those elections with an additional 11 elections concerning cross-over and white racial bloc voting covering the period 1992 to 1995. The Defendant-Intervenors also submitted evidence from witness Dr. Taylor who testified to socio-economic factors as of May 1992, after the creation of District 4. Further the Plaintiff submitted into evidence an additional 37 elections which he offered to show lack of political cohesion between Mexican-Americans and Puerto Ricans during the period of 1992 until 1995. The Plaintiff submitted evidence regarding the citizenship of Hispanics, data which was available only after the *Hastert* decision by special tabulation. Cleveland Report, App. 91. The Defendants submitted evidence that examined the grant of citizenship to Chicago area Hispanics until 1994. Taylor Report, App. 97, 98.

The Plaintiff could not have been considered to have "challenged" the decision of *Hastert* for a number of other reasons. First, the *Hastert* case obviously did not judge the facts of that case in light of the prevailing law at the time that King filed suit. The *Hastert* court did not consider whether or not District 4 was predominantly drawn on the basis of race. Consequently, it did not consider that District 4 ought to have been subject to strict scrutiny. Therefore, where the standards which were applied in *Hastert* were not the same as were required to be applied to the claim of the Plaintiff in the instant case, there was no basis to say that the Plaintiff "challenged" the *Hastert* decision.

Further, the Plaintiff could not "challenge" the *Hastert* decision if he was not a party to the *Hastert* case. Certainly, giving a case a future binding effect is necessary to preserve the finality of judgments. Under Rule 60(b) federal courts accomplish this through the imposition of the standard of "clear error" under Rule 60(b) and its concomitant standard "abuse of discretion". Rule 60(b), however, presumes that the person filing suit is attacking the judgment as a party to the prior proceeding. *See,* Rule 60(b). Neither King, nor a party in privity with King, was ever a party to the proceeding of *Hastert* and, therefore, the lower court had no basis to apply the standard of review applicable under Rule 60(b). In *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, *reh.den.* 110 S.Ct. 11 (1989) this Court said that:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449 p.417 (1981).

Id. at 761, S.Ct. at 2184 (emphasis added). Thus, where a party such as King files an independent action, he has all the rights of a party in an independent action, including the right to prove his case by no more than a preponderance of the evidence. *See, Jackson v. DeSoto Parish School Bd.*, 585 F.2d 726, 729 (5th Cir. 1978) ("This

court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence of this area.")

Moreover, equitable application of collateral estoppel would show that the imposition of "clear error" was improper. The creation of District 4 was agreed to by all the parties to the proceedings in *Hastert* and as such it was never "actually litigated". Opinion 1, App. 18-19. *See, Prymer v. Ogden*, 29 F.3d 1208, 1212 (7th Cir. 1994) (in order to apply some equivalent of collateral estoppel, the factual issue must be "actually litigated"). And, therefore, "[a] fact established in prior litigation not by judicial resolution, but by stipulation has not been `actually litigated' and thus is the proper subject of proof in subsequent proceedings." *United States v. Young*, 804 F.2d 116, 118 (8th Cir. 1986), *Otherson v. Department of Justice, I.N.S.*, 711 F.2d 267, 274 (D.C. Cir. 1983); *see, also, United States v. International Bldg. Co.*, 345 U.S. 502, 504-505, 73 S.Ct. 807, 808-809 (1953). *See, Hastert* at 662.

B. "Judicial Economy" Was No Basis to Bind Plaintiff to the Findings in *Hastert*.

The lower court also justifies imposing a modified standard of Rule 60(b) on the basis of "judicial economy". Opinion 1, App. 15, n.16. Judicial economy, as a basis for binding a party to a prior judgment in a case to which he was not a party, was rejected by this Court in *Martin v. Wilks*, saying that acceptance of this argument

> would require a rewriting rather than an interpretation of the relevant Rules. . . . [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other.

Id. at 767, S.Ct. at 2187. *See, also, Restatement of the Law (Second), Judgments*, §27 comment e ("the interests of conserving judicial resources . . . [is] less compelling when the issue on which preclusion is sought has not actually been litigated before.")

C. Upon Application of Strict Scrutiny, Deference to *Hastert* Erroneously Displaced the Usual Presumption that District 4 was Unconstitutional.

When the lower court gave deference to *Hastert* and raised the bar for the Plaintiff by requiring that he meet a standard greater than a preponderance of the evidence, the lower court dispensed with the presumption that District 4 was unconstitutional and its consequential burden upon the Defendants to demonstrate that there was a strong basis in evidence for finding a violation of §2 and that District 4 was narrowly-tailored. *Miller*, at __, 115 S.Ct., at 2490, *Shaw I* at ___, 113 S.Ct., at 2839-32. Even though the lower court acknowledged that "once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified.", Opinion 1, App. 30, citing *Miller* and *Shaw I, supra*, review of the lower court's analysis, in both its original and reconsidered opinions indicates that the lower court sought evidence from the Plaintiff to prove that there was no "strong basis in evidence" to find a violation of §2[16] and that District 4 was ***not*** narrowly-tailored;[17] in other words, to prove negatives.

In the lower court's original opinion, at "IV. A.", titled "Whether the *Hastert* court's Section 2 Finding Was Clear Error", App. 47-53, the lower court weighed the Defendants' evidence in finding that there was a "strong basis in evidence" for finding a violation of §2.[18] This evidence, however, was not considered outside the context

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[16] The lower court's language is explicit: "*King* has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent." Opinion 1, App. 50 (emphasis added). "*King* has thus failed to establish that the *Hastert* court's finding of political cohesiveness was clearly erroneous. He has likewise failed to establish that the circumstances have changed in any quantifiably significant measure since 1991." Opinion 1, App. 50-51 (emphasis added). The "proposition advanced by *King* [that white bloc voting has lessened since 1991] is [not] supported by recent city-wide election results or meaningful statistical analysis." Opinion 1, App. 51 (emphasis added)

[17] "There is no evidence that the *Hastert* court abused its discretion. . . . Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan." Opinion 1, App. 56. (citations omitted).

[18] The lower court cited the following in support: judicial notice of the elections of Congressman Gutierrez in 1992 and 1994 "minimize[s] in many respects the force of King's arguments that the *Hastert* court erred in finding that the three *Gingles* prerequisites were satisfied." Opinion 1, App. 47. Dr. Lichtman's analysis on the presence of white racial bloc voting defeats proposition by Plaintiff that

of *Hastert* to establish the Defendants' burden under strict scrutiny; in other words, the lower court considered the Defendants' evidence only in the context of whether the *Hastert* court was in error. As the lower court concluded, "[t]he *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act." Opinion 1, App. 53. Moreover, the analysis by the lower court does not include a discussion of the Defendants' burden or how the evidence submitted by the Defendants shows that they had met that burden. Similarly, in the lower court's narrow-tailoring analysis in its original opinion, the court simply deferred to the *Hastert* decision, without reference to the Defendant-Intervenors' burden or any evidence submitted by the Defendant-Intervenors. Opinion 1, App. 56-57. In the lower court's reconsidered opinion, the lower court refers to the burden being met, not in any way by the Defendants, but by the *Hastert* court.

V. Where District 4 Was Court-Approved, It Should Have Been Subject to a Standard of Strict-Scrutiny Greater Than That Applied to a Legislatively Enacted District.

In the instant case, District 4 was approved by a federal court panel in the *Hastert* case and upheld twice by the lower court in the instant case. Therefore, this is not a legislatively enacted gerrymander, but a judicially enacted gerrymander. A state legislature may engage in §2 remedial districting so long as it does not "subordinate traditional districting principles to race substantially more than reasonably necessary". *Bush*, at ___. Federal courts, on the other hand, lack constitutionally delegated authority to engage in redistricting absent a violation of federal law, *Voinivich*, at 156, S.Ct. at 1156-57, abdication by a state legislature of its responsibility to redistrict, *Wise*, at 540, S.Ct. at 2497, or absent a §2 claim under the Voting Rights Act or other equitable principles which require the creation of a §2 remedial district. *Abrams*, at ___, 117 S.Ct., at 1935. Thus, "[a] more stringent standard is applied to judicial reapportionments,

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there is less white racial bloc voting. Opinion 1, App. 51-52. Dr. Taylor's analysis, based upon amnesty data, that a large number of persons within the zip code areas where Hispanics reside defeated Plaintiff's proposition that voting population among Hispanics was below 50%. Opinion 1, App. 50-51 n. 58. Witnesses for the Defendant-Intervenors "establish[es] the political and social cohesiveness of the Hispanic community." Opinion 1, App. 51 n.59. "Exclusion of Hispanics from the powerfully important slating process remain." Opinion 1, App. 52. .

. . . , because a federal court, 'lacking the political authoritativeness that the legislature can bring to the task', must act 'circumspectly, and in a manner "free from any taint of arbitrariness or discrimination"'". *Wise v. Lipscomb*,. at 437 U.S. 535, 541, 98 S.Ct. 2493, 2498 (1978) (citing *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458 (1964)). *See, also, Bush*, at ___, 116 S.Ct., at 1961 ("[u]nder our cases, the States retain a flexibility that federal courts enforcing §2 lack . . . .").

The lower court applied a more lenient standard against District 4 when it "modified" application of Rule 60(b) to the Plaintiff and imposed a "clear error" standard. Had the lower court held District 4 to a standard of scrutiny required of a court-ordered plan, it would not have found District 4 narrowly-tailored. The excessive use of race in District 4 is clearly evident in the "ragged" boundary surrounding the district which segregates Hispanic from white and African-American populations, in addition to the "western connector" which selects Hispanic city blocks as it winds in and out of the City of Chicago to tie together two separate and dispersed Hispanic populations on opposite sides of town. *See,* Hispanic VAP Map, Attachment. Thus, if court-ordered plans are a standard in legislatively drawn §2 districts, surely District 4 is not a "hypothetical court-drawn district" from which legislatures may gauge their plans. *See, Bush*, at ___, S.Ct., at 1970, (O'Connor, J., concurring) ("districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for *predominantly racial reasons*, are unconstitutional.") (emphasis in original).

CONCLUSION

This Court has recognized that racial gerrymandering is more than merely a matter of creating non-compact districts and subordinating other traditional districting criteria on the basis of race. The subordination of traditional districting criteria to race is indicative of a greater harm, that of

> reinforc[ing] the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same

candidates at the polls.

Shaw I, at __, 113 S.Ct., at 2827 (1993). And this perception, indeed, "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.*

If the lower court is not reversed, District 4 will continue to instill the perception that there is no longer the necessary dedication to protect equality under the law, *for all persons* regardless of their color, and will lend greater authority to group rights and the pernicious divisions that will continue to result therefrom. As a matter of law, District 4 is not narrowly-tailored. Where "appearances do matter" *Shaw I* at __, 113 S.Ct., at 2827, the lower court could not have upheld such a patently offensive racial gerrymander, even if there was a "strong basis in evidence" to find a violation of §2.

The Court should note probable jurisdiction. Summary reversal is appropriate for the reasons stated herein. Otherwise, the appeal should be set down for plenary review.

Respectfully submitted,

James C. Ten Broeck, Jr.
Counsel of Record
Attorney for Appellant

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

James R. King,

Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	Hon. Michael S. Kanne
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	Hon. Charles R. Norgle, Sr. Hon. David H. Coar
	)	
Defendant Intervenors.	)	

RECEIVED AUGUST 29, 1997
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that JAMES R. KING, the Plaintiff in the above referenced matter, hereby appeals to the Supreme Court of the

Outline of Opinion in
King v. State Board of Elections et al.
Dated March 7, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	Hon. Michael S. Kanne
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	Hon. Charles R. Norgle, Sr. Hon. David H. Coar Dated: March 7, 1996
	)	
Defendant Intervenors.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, James R. King ("King"), claims that the configuration of the Illinois Fourth Congressional District violates the Fourteenth Amendment. To address this claim, this court must review the history

of the current district map and resolve the unusual procedural issues that accompany King's lawsuit.

Because the Illinois General Assembly failed to reapportion Illinois' legislative districts following the issuance of the 1990 census report, that task fell to an earlier panel of this court by default.[1] *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 641 (N.D. Ill. 1991) (hereinafter "*Hastert*"). On November 6, 1991, the *Hastert* court issued an order reapportioning Illinois' twenty (20) congressional seats. Through this order, the *Hastert* court created a "majority-minority" Hispanic congressional district for the first time in Illinois history. The situs of this Hispanic majority district is Illinois' Fourth Congressional District, which is located in Cook County and the City of Chicago.[2] Since November 6, 1991, the United States Supreme Court has issued two course-altering opinions concerning congressional reapportionment and the Equal Protection Clause of the Fourteenth Amendment. *See Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475 (1995). In addition, two congressional elections have been held; in both elections, the electorate of the Fourth Congressional District sent a Hispanic representative to Congress.

In February 1995, King, a resident of the Fourth Congressional District, filed the instant lawsuit challenging the constitutionality of the Hispanic majority district adopted in *Hastert*.[3] King contends that the borders of the Fourth Congressional District were drawn predominately on the basis of race and without a compelling state interest to justify this racially-based classification. He also opposes the district's current configuration on moral grounds. King thus argues that the configuration of the Fourth Congressional District approved

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1 Article 4, §3(b) of the Illinois Constitution provides in pertinent part:

> In the year following each Federal decennial census year, the General Assembly shall redistrict the Legislative Districts . . . [by] June 30 of that year . . . .

2 A map of the Fourth Congressional District is attached as Appendix Exhibit A.

3 William J. Kelly and PAC for Middle America originally joined King as plaintiffs in this lawsuit. Kelly, a resident of Illinois' First Congressional District, challenged the *Hastert* court's reapportionment of the First Congressional District -- a "super-majority" African-American congressional district -- on the same grounds that King challenges the reapportionment of the Fourth Congressional District. Kelly and PAC for Middle America voluntarily dismissed their claims several months prior to trial.

in *Hastert* violates the Equal Protection Clause of the Fourteenth Amendment. King's lawsuit compels this court to again enter the thicket of congressional redistricting. *See Hastert*, 777 F. Supp. at 641 (citation omitted). More specifically, this court must determine whether the *court-ordered* Hispanic majority district adopted in *Hastert* passes constitutional muster under the Supreme Court's most recent equal protection jurisprudence.

I. Relevant Procedural History

Following the filing of King's lawsuit, this court permitted Congressman Bobby Rush (Dem.-IL, 1st Dist.), Timuel Black, Al Johnson, Elvira Carrizales, Neomi Hernandez, the Chicago Urban League, and the United States Department of Justice ("DOJ") to intervene as defendants under Federal Rules of Civil Procedure 24(a) and (b).[4] In addition, the court permitted the Democratic National Committee to participate *amicus curiae*.

On August 15, 1995, King filed a motion for a preliminary injunction seeking to enjoin the Illinois Congressional primary and general elections presently scheduled for March 19, 1996, and November 5, 1996, respectively. King predicated his request for a preliminary injunction on the alleged constitutional deprivation articulated in his complaint; namely, that the *Hastert* court's configuration of the Fourth Congressional District on the basis of race violated his rights under the Fourteenth Amendment to participate in a "color-blind election process." Pursuant to Rule 65(a)(2), this court consolidated the hearing on King's preliminary injunction motion with the three day trial conducted December 13-15, 1995, on the merits of King's complaint. *See Fed. R. Civ. P. 65(a)(2)*. Since many of the arguments advanced at trial by King either directly or indirectly challenged or implicated factual findings and legal conclusions made by the *Hastert* court, this court first had to resolve several procedural issues concerning the relationship between this litigation and the *Hastert* litigation. Two issues predominated: first, whether and to what extent the parties are bound by the *Hastert* court's findings of fact; and second, the standard by which this court would review the *Hastert*

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4 *See Pac for Middle America v. State Board of Elections*, No. 95 C 827, 1995 WL 571893 (N.D. Ill. Sept. 20, 1995) (three judge panel); Minute Order dated Nov. 8, 1995. Rush, Johnson, Hernandez, and the Chicago Urban League all participated in the *Hastert* litigation.

court's conclusions of law.

A.Standards Governing the *Hastert* court's Findings of Fact

1.Rule 60(b)

Defendant State Board of Elections ("SBOE") and defendant-intervenor DOJ argued that King's lawsuit should be considered an attempt to modify or vacate the *Hastert* court's reapportionment order since it essentially attacked the factual findings and legal conclusions of the *Hastert* opinion. Based upon this characterization, the SBOE and DOJ maintained that King's lawsuit should have been transferred to the *Hastert* panel pursuant to Local General Rule 2.21D(8).[5] If the case had been transferred, King would have had to petition the *Hastert* court to reopen those proceedings and permit him to intervene. The *Hastert* court, in turn, would have considered King's challenges to its November 1991 reapportionment order under Rule 60(b)(5) or (b)(6).[6] Proceeding under Rule 60(b) would have been a daunting task, since "relief from a judgment under Rule 60(b) is an extraordinary

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5 The Honorable Michael S. Kanne, Charles R. Norgle, Sr., and Suzanne B. Conlon presided over the *Hastert* litigation. Local General Rule 2.21D provides:

Direct Assignment of Cases to the Calendar of a Judge

In each of the following instances, the assignment clerk shall assign the case to a judge in the manner specified:

***

g(8) *Cases filed to enforce, modify, or vacate judgment*

Proceedings to enforce, modify, or vacate a judgment should be brought within the case in which the judgment was entered. If a separate case is filed for the purpose of enforcing, modifying, or vacating a judgment entered in a case previously filed in this District, the case shall be assigned directly to the judge to whom the earlier case was assigned.

6 Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment . . . .

Fed. R. Civ. P. 60(b)(5), (b)(6). Rule 60(b) also provides that a court may "entertain an independent action to relieve a party from a judgment, order or proceeding." Resort to an independent action -- an action in equity to obtain relief from a judgment -- may only be had rarely and under exceptional circumstances. *11 Wright & Miller, Federal Practice and Procedure: Civil.2d §2868*, at 397-98

remedy reserved for the exceptional case."[7] *See Camp v. Gregory*, 67 F.3d 1286, 1290 (7th Cir. 1995).

This court, which includes two of the three judges who presided

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(1995). An independent action in equity has the following "indispensable" elements:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id. at 397 & n.5 (citations omitted). King's action does not contain all of these indispensable elements and thus cannot be characterized as an independent action in equity. *See, e.g., Rader v. Cliburn*, 476 F.2d 182, 184 (6th Cir. 1973) (lawsuit which alleged that a federal judge failed to consider a relevant state statute when he ordered the reapportionment of the Macon County, Tennessee's Board of Education Districts two years earlier was not a case of unusual or exceptional circumstances meriting relief as an independent suit in equity).

7 Federal Rules of Civil Procedure 59(e) and 60(b) both govern post-judgment motions attacking the merits of a district court's decisions. *See Russell v. Delco Remy Div. of Gen. Motors*, 51 F.3d 746, 749 (7th Cir. 1995). Motions for Reconsideration under Rule 59(e) permit a court to "correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (*citing Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)); *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd* 736 F.2d 388 (7th Cir. 1984). In addition, a motion for reconsideration is appropriate where a controlling or significant change in the law or facts has occurred since the issue was submitted to the court. *Waunakee*, 906 F.2d at 1191 (citation omitted). The Rule permits a court to correct its own errors, thereby avoiding the expenses and burdens of an appeal. *Russell*, 51 F.3d at 749. A Rule 59(e) motion must be filed within ten (10) days of the judgment. *Fed. R. Civ. P. 59(e)*; *Russell*, 51 F.3d at 749; *Helms v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (a motion to alter or amend a judgment served more than ten days after a final judgment is treated as a Rule 60(b) motion).

Rule 60(b) "enables a court to grant relief from a judgment under the particular circumstances listed in the text of the rule." *Russell*, 51 F.3d at 749. It was designed to "address mistakes attributable to special circumstances and not merely to erroneous applications of law." *Id.* It affords extraordinary relief and is application is limited to extraordinary circumstances. *Id.*; *Harold Washington Party v. Cook Co., Ill. Democratic Party*, 984 F.2d 875, 879 (7th Cir.), *cert. denied* ___ U.S. ___, 114 S. Ct. 86 (1993); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). It too permits a court to correct only "manifest errors of law or fact." *See United States ex rel. Felder v. Gramley*, 893 F. Supp. 768, 773 (N.D. Ill. 1995); *Jones v. Banks*, 892 F. Supp. 988, 989 (N.D. Ill. 1995)

over the *Hastert* case, declined to transfer King's case as suggested by the SBOE and DOJ for three reasons. First, the doctrine of the law of the case mandated this court's rejection of the SBOE and DOJ argument. The law of the case doctrine typically provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Donohoe v. Consolidated Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (*quoting Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983)). The doctrine applies not only to the prior decisions of the same court, but also to prior decisions of a coordinate court in the same case. *Id.* (*citing Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-18, 108 S. Ct. 2166, 2177-79 (1988)). In this context, the doctrine of the law of the case functions like the doctrine governing reconsideration; that is, "a court will ordinarily not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling." *See Johnson v. Burken*, 930 F.2d 1202, 1207 (7th Cir. 1991) (*quoting Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied* 459 U.S. 1226, 103 S.Ct. 1233 (1983)). Thus, when a court is asked to change a prior decision in its own case or in the case of a coordinate court, the law of the case doctrine permits it to avoid reexamining the prior decision "unless powerful reasons are given for doing so." *Id.*

In this case, King filed a petition for the appointment of a three judge panel pursuant to 28 U.S.C. section 2284(a) shortly after filing

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(citation omitted).

[Footnote 7 con't.]

Rules 59(e) and 60(b) thus provide some overlapping relief, albeit the overlap is imperfect. *Russell*, 51 F.3d at 749. "A court should correct a manifest error of law under Rule 59(e). . . . Rule 60(b), on the other hand, is not an appropriate vehicle for addressing simple legal error; otherwise, a party could circumvent the ordinary time limitation for filing a notice of appeal." *Id.* The correction of mistakes under Rule 60(b) is left to the district court's sound discretion, but that discretion must be exercised with a view to the differences inherent in the two rules. *Id.*

his complaint.[8] The SBOE agreed that a three judge panel was appropriate but argued that the three judges who presided over the *Hastert* litigation should be reappointed since King's complaint sought "to modify" that court's redistricting order. (*See* SBOE Resp. Mem., at ¶¶4-5). In accordance with 28 U.S.C. section 2284(b)(1), the petition was transferred to the Honorable Richard A. Posner, Chief Judge of the Seventh Circuit Court of Appeals, for decision.[9] Judge Posner appointed the present panel, and thereby rejected the SBOE's request for assignment of the case to the *Hastert* court.

Second, neither the SBOE nor DOJ established that Local Rule 2.21D(8) applied to the unique circumstances of King's complaint. The purpose of Local Rule 2.21D(8) appears to be three-fold: to prevent forum or judge shopping; to ensure continuity of decisions; and to promote judicial economy. Given these purposes, it is axiomatic that when a court enters a judgment resolving a dispute among certain parties, the same court must preside over any secondary action brought by one of the parties to enforce, modify or vacate that judgment. King, however, does not fall within the parameters of this axiom. He was neither a party to nor in privity with any party to the *Hastert* proceeding, and thus lacked standing to petition the *Hastert* court under Rule 60(b) for an order vacating or modifying its judgment order. *See Fed. R. Civ. P. R. 60(b); National Acceptance Co. of Am., Inc. v. Frigidmeats, Inc.*, 627 F.2d 764, 766 (7th Cir. 1980) ("[i]t is well settled that . . . 'one who was not a party lacks standing to make a 60(b) motion'") (*quoting Wright & Miller, Federal Practice and*

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8 Section 2284(a) provides that "[a] district court of three judges shall be convened when

. . . an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ." *28 U.S.C. §2284(a).*

9 Section 2284 states in pertinent part:

(b)In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1)Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C. §2284(b)(1).

Procedure §2865, at 225-26 (1973)). In addition, there is no evidence that he engaged in any impermissible judge shopping, which would have been a particularly fruitless endeavor since Judge Posner appointed two of the three *Hastert* judges to preside over this case. Similarly, the interests of judicial economy were not compelling as King alleged that both the governing law and the relevant facts had changed since the *Hastert* court issued its reapportionment order. Thus, the law of the case doctrine notwithstanding, the DOJ and SBOE failed to establish that King's complaint was eligible for reassignment under Local Rule 2.21D(8).

Finally, the *Hastert* court did not retain jurisdiction to hear and decide future constitutional challenges to its reapportionment order. The DOJ argued that the *Hastert* court implicitly retained jurisdiction to enforce or modify its judgment in light of changed circumstances, but the authority it cited concerned the modification of injunctive relief. *See System Fed'n No. 91, Ry. Emp. Dept., AFL-CIO, v. Wright*, 364 U.S. 642, 647-48, 81 S. Ct. 368, 371 (1961) (district court abused its discretion in refusing to modify consent decree that enjoined a number of specific discriminatory acts); *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S. Ct. 460, 462 (1932) (court in equity has power to modify an injunction to adapt to changed conditions, even where the injunction was entered by consent decree). This authority is inapposite as the *Hastert* court issued its reapportionment order pursuant to Section 2 of the Voting Rights Act. To that end, the *Hastert* court ordered that the court-ordered redistricting plan "shall govern the nomination and election of members of the House of Representatives from the State of Illinois, effective with respect to the 1992 primary and continuing until Illinois congressional districts are reapportioned in accordance with law." *Hastert*, 777 F. Supp. at 662. The *Hastert* court thus not only declined to retain jurisdiction to consider subsequent non-party challenges to its reapportionment order but, equally important, it conditionally limited the duration of its order.[10] *See Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 730 n.1 (5th Cir. 1978) ("[w]e note . . . that in reapportionment, unlike school desegregation and institutional reform cases, the court's

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10 In this regard, the *Hastert* court essentially foresaw that a revised reapportionment plan could supplant and supersede its order either through legislative action or a subsequent court challenge, provided the revised plan was "in accordance with [the] law." Thus, a subsequent court challenge to the *Hastert*

jurisdiction is not continuing, and the plan, once adopted and acted upon [*i.e.*, an election is held], does not require further judicial supervision").

Accordingly, this court did not transfer King's complaint to the *Hastert* court for further proceedings under Rule 60(b).

2. Conditional Judicial Notice

Although King was not a party to the *Hastert* litigation and thus could not be bound by that court's findings of fact or judgment under the doctrines of *collateral estoppel* or *res judicata*,[11] his complaint both directly and indirectly challenged the *Hastert* court's findings of fact and judgment. In recognition of the unique nature of King's claim and to expedite the proceedings at trial, this court took judicial notice of the *Hastert* court's findings of fact under Federal Rule of Evidence 201. *See, e.g., Philips Medical Sys. Int'l, B.V. v. Bruetman*, 982 F.2d 211, 215 n.2 (7th Cir. 1992) (federal courts may take judicial notice of proceedings, including evidence, in other courts both within and outside of the federal judicial system "if the proceedings have a direct relation to matters at issue"); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied* 461 U.S. 960, 103 S. Ct. 2436 (1983) (same). More specifically, this court informed the parties that it would admit into evidence the *Hastert* court's finding of facts and would adopt those findings as conclusive unless King showed by law or otherwise that the *Hastert* court either

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court's order would not threaten the interests of comity or the orderly administration of justice where the challenge was based upon a change in law.

11 The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 415 (1980); *accord Havoco of Am., Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 (7th Cir. 1995). Collateral estoppel precludes relitigation of issues in a subsequent proceeding when:

> (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical.

Havoco, 58 F.3d at 307; *Kraushaar v. Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995).

In contrast, under *res judicata*, "a judgment on the merits in a prior suit bars a second suit involving the same parties, or their proxies, based on the same cause of action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5, 99 S.Ct.

erred in making specific findings of fact or that the circumstances had changed since November 1991 such that specific findings of fact were no longer valid and needed to be modified. *See* Tr., at 36, 652.

This court conditionally admitted the *Hastert* court's findings of fact through judicial notice for two reasons. First, had King been a party or in privity with a party to the *Hastert* action, his constitutional challenge of the *Hastert* court's order and findings of fact would have proceeded under Rule 60(b).[12] Under Rule 60(b), the *Hastert* court's findings of fact made pursuant to Rule 52(a) would have been law of the case. *See Bennett v. Arrington*, 806 F. Supp. 926, 927 n.2 (N.D. Ala. 1992), *aff'd in part, rev'd in part on other grounds* 20 F.3d 1525 (11th Cir. 1994).[13] As such, the *Hastert* court would not have

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645, 649 n.5 (1979); *accord Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338 (7th Cir. 1995). Three elements must exist for *res judicata* to apply: (1) a judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action between both suits. *Brzostowski*, 49 F.3d at 338.

12 Assuming standing, King at a minimum could have moved for a modification of the Hastert court's order under Rule 60(b)(6). A motion for relief under Rule 60(b)(6) is only appropriate if the grounds for relief do not fit under any of the other subsections of Rule 60(b). *Margoles v. Johns*, 798 F.2d 1069, 1073 n.6 (7th Cir. 1986) (citation omitted), *cert. denied* 482 U.S. 905, 107 S.Ct. 2482 (1983). Relief under Rule 60(b)(6) is only warranted "upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." *Id.* at 1073 (*citing Ackerman v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950)). While a post-judgment change in decisional law, without more, is insufficient to constitute an extraordinary circumstance permitting relief under Rule 60(b), *see McKnight v. United States Steel Corp.*, 726 F.2d 333, 336 (7th Cir. 1984), extraordinary circumstances will be found to exist where, as here, the change in decisional law may render the court's prior decision unconstitutional. *See, e.g., McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir. 1995) ("A supervening change in governing law that calls into serious question the correctness of the court's judgment may justify recall of a mandate.").

In addition, a motion for relief from judgment under Rule 60(b)(5) or (b)(6) must be made "within a reasonable time." *See Fed. R. Civ. P. 60(b)*. Because King based his constitutional challenge in part on a change in the governing law, any inquiry into the timeliness of King's challenge must necessarily focus on the passage of time between the advent of the changed law (*i.e.*, the issuance of the Supreme Court's *Shaw v. Reno* decision in June 1993) and the filing of King's complaint. This twenty month time period (*i.e.*, June 1993 to February 1995) is not too excessive to be declared unreasonable. *See PAC for Middle Am. v. State Bd. of Elections*, No. 95 C 827, 1995 WL 571887, *4 (N.D. Ill. Sept. 20, 1995) (three judge panel).

reexamined its factual findings to decide a Rule 60(b) motion unless powerful reasons existed for doing so -- such as the occurrence of manifest error or a controlling or significant change in the factual circumstances.[14] Since King's lawsuit is at its very core a challenge to the *Hastert* court's order, this court concluded that King's lack of standing under Rule 60(b) should not determine the standard of review applicable to the *Hastert* court's findings of fact. The court therefore adopted the standards that would have applied had King sought to modify the *Hastert* order under Rule 60(b).[15] The court also conditionally admitted the Hastert court's findings of fact to promote important interests in finality and judicial economy.[16]

To demonstrate that the *Hastert* court erred in making a specific finding of fact, King has to establish that the court committed clear

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13 The *Bennett* litigation originated in 1981 as a reverse discrimination claim arising out of a consent decree. *See Bennett*, 806 F. Supp. at 927. Following a trial in 1985, the court ruled against the plaintiffs on their reverse discrimination claim. *See In re Birmingham Reverse Discrimination Employment Litigation*, No. 84-P-0903-S, 1985 WL 56690 (N.D. Ala. 1985). The Eleventh Circuit reversed, *see In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180 (1989). The Supreme Court remanded the case to the district court for further trial on the plaintiffs' reverse discrimination claim. On remand, the district court adopted the findings of fact of the 1985 trial court under the law of the case doctrine, explaining:

Numerous findings of fact were made by the district court [in 1985]. . . . There is no need to repeat these findings, which were not set aside on appeal and under the law of the case remain as determinations for purposes of this decision. *Bennett*, 806 F.2d at 927 n.2 (citation omitted). Like the *Bennett* court, this court will adopt the *Hastert* court's factual determinations for the purposes of this decision, excluding any clearly erroneous findings and any findings that are no longer valid due to changed circumstances.

14 As previously noted, the law of the case doctrine essentially functions as a motion for reconsideration in this context. *See Johnson v. Burken*, 930 F.2d 1202, 1207 (7th Cir. 1991). The grounds for entertaining a motion for reconsideration -- to correct manifest errors of law or fact or to consider controlling or significant changes in the law or facts since the matter was submitted to the court -- thus define the grounds for entertaining a subsequent challenge under Rule 60(b) to a court's specific findings of fact. *See United States v. Gramley*, 893 F. Supp. 768, 773 (N.D. Ill. 1995) (Rule 60(b) permits a court to correct "manifest errors of law or fact"); *Jones v. Banks*, 892 F. Supp. 988, 989 (N.D. Ill. 1995) (same); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (recognizing grounds for reconsideration due to changes in controlling law or facts).

15 This court has slightly modified the standards to comport to the procedural

error.[17] *See Fed. R. Civ. P. 52(a).* A finding of fact is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985) (citation omitted); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948); *United States v. Price*, 54 F.3d 342, 348 (7th Cir. 1995). Under this standard, the court must strongly defer to the trier of fact's findings. *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). As such, "if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighted the evidence differently as a trier of fact." *Id.* "Where there are two

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posture of this case (*i.e.*, King has filed an independent lawsuit rather than a Rule 60(b) motion to vacate of modify the *Hastert* judgment). Accordingly, this court will consider the *Hastert* court's findings of fact conclusive unless King establishes that the *Hastert* court committed clear error in making specific findings of fact or proves by a preponderance of the evidence that the factual circumstances have changed since the issuance of the *Hastert* decision.

16 The concepts of finality and judicial economy provide a very pragmatic foundation for the standard of review adopted by this court. Since King has brought this lawsuit in his individual capacity rather than on behalf of a certified class, this court's findings of fact would not bind other potential private litigants who are not in privity with King. It is therefore conceivable that these other potential litigants, displeased by this court's ruling, might separately file a series of lawsuits challenging the constitutionality of the Fourth Congressional District. If the court failed to take judicial notice of and conditionally admit the *Hastert* court's factual findings, its ability to render a final judgment on the district's constitutionality would prove elusive. Each successive challenge would require the development of new, potentially inconsistent factual records. By taking judicial notice of and conditionally admitting its prior fact findings, the court has established a common core of facts that may only be modified by proof of changed circumstances or demonstration of clear error. If the party challenging the district's constitutionality fails to allege or establish the existence of changed factual circumstances or clear error of significant magnitude to affect the constitutional analysis, a court should be able to dispose of the lawsuit under Rules 12, 56 or 50(a). In this manner, this court's decision to take judicial notice of the *Hastert* court's findings of fact furthers the interests of finality and judicial economy while avoiding the potential hazards associated with successive, cumulative constitutional challenges brought by independent litigants.

17 Rule 52, entitled "Findings by the Court; Judgment on Partial Findings" provides in pertinent part:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusion

permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1511. Accordingly, unless clear error is established, this court will defer to the *Hastert* court's findings of fact. *See Johnson v. Mortham*, ___ F. Supp. ___, 1995 WL 707856 (N.D. Fla. Nov. 20, 1995).[18]

Alternatively, King must establish by a preponderance of evidence that specific factual circumstances have changed. *See Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 730 (5th Cir. 1978). Once such evidence has been proffered, this court will analyze the particular finding of fact *de novo*.

In addition to taking judicial notice of the *Hastert* court's findings of fact, this court took judicial notice of the evidence presented to the *Hastert* court. (Tr. at 638). The court admitted this evidence for the limited purpose of establishing the evidentiary record upon which the *Hastert* court relied to make its decision. (*Id.*). The *Hastert* court's evidentiary record was not admitted for any other purpose, except where one of the parties individually or jointly moved for the admission of a particular portion of that record.

B.Standard of Review of the *Hastert* court's Conclusions of Law

An appellate court traditionally reviews a district court's conclusions of law *de novo*. *See Apostol v. Landau*, 957 F.2d 339, 341 (7th Cir. 1992). Under this standard, the appellate court is not bound by the

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of law thereon, ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

18 A brief review of the on-going *Johnson* litigation is required. After the Florida legislature failed to adopt a congressional reapportionment plan to comply with the 1990 census results, the task fell to the federal court. The district court initially held the existing plan unconstitutional, and appointed a Master to recommend a replacement plan. *See DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992). The *DeGrandy* court subsequently adopted the Master's Report and Recommendation, which created two African-American majority-minority districts and one African-American influence district. Following the Supreme Court's decision in *Shaw*, plaintiffs filed a lawsuit in 1994 alleging that District 3 (one of the majority-minority districts created in the 1992 court order) violated the Equal Protection Clause. The court found that District 3 was oddly configured. *See Johnson*, ___ F. Supp. at ___, 1995 WL 707856, at *2. The plaintiff subsequently moved for summary judgment. The *Johnson* court granted the motion in part, concluding as a matter of law, that the plaintiffs proved that racial considerations predominated in the drawing of District 3. The *Johnson* court

district court's legal conclusions but instead examines the law "anew." *Lulich v. Sherwin-Williams Co.*, 992 F.2d 719, 721 (7th Cir. 1993); *Black's Law Dict.* 392 (5th ed. 1979). Although this court is not an appellate court, the nature of King's complaint requires it to review the *Hastert* court's legal conclusions. Under these circumstances, this court adopted the law of the case doctrine as the standard of review for the *Hastert* court's legal conclusions. As with a motion to vacate or modify a judgment under Rule 60(b), this court will not disturb the *Hastert* court's conclusions of law but for manifest or plain error. *See Russell v. Delco Remy Div. of Gen. Motors*, 51 F.3d 746, 749 (7th Cir. 1995) (discussed *supra* in footnote 8). At the same time, however, this court will review *de novo* the *Hastert* court's conclusions of law where the decisional law has arguably changed.

King proffers three "powerful reasons" warranting reexamination of the *Hastert* court's findings of fact and conclusions of law: first, the governing law has changed as a result of the Supreme Court's decisions in *Shaw* and *Miller*; second, certain factual findings made by the *Hastert* court were clearly erroneous; and third, the facts have changed since November 1991.

II. The Hastert Court's Decision

The 1990 decennial census report revealed that Illinois' population had grown by 4,084 people, or 0.0357%, between 1980 and 1990. *Hastert*, 777 F. Supp. at 637. Because the rate of Illinois' population growth was proportionally smaller than that of the United States as a whole, Illinois was only entitled to twenty seats in the United States House of Representatives rather than its previous twenty-two. The Illinois constitution required the General Assembly to reapportion the state's congressional districts to comport with the 1990 census results; however, it failed to do so. As a result of the General Assembly's abdication of its constitutional responsibility, five separate lawsuits were filed seeking a common declaration; namely, Illinois' then existing congressional districting plan was unconstitutional due to the population and demographic changes represented in the 1990 census report. *Id.*

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relied upon specific findings made by the *DeGrandy* court as the basis for its ruling. *Id.* at ___, 1995 WL 707856, at *20. The *Johnson* court denied, however, plaintiffs' motion for summary judgment with respect to whether District 3 survives strict scrutiny.

The Republican Party members of the 1990 Illinois congressional delegation (the "*Hastert*" plaintiffs) filed the first lawsuit on June 27, 1991. Shortly thereafter, a group of Hispanic and African-American resident-voters (the "*Nieves*" plaintiffs) filed the second lawsuit seeking, *inter alia*, the creation of a majority-minority Hispanic congressional district under Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Next, a group of resident voters from various Illinois congressional districts, ostensibly acting on behalf of the Democratic Party members of the 1990 Illinois congressional delegation (the "*Rosebrook*" plaintiffs), filed the third lawsuit. Representative Cardiss Collins (D-IL; 7th Dist.) and Representative Charles Hayes (D-IL; 1st Dist.) jointly filed the fourth lawsuit (the "*Collins*" plaintiffs). Finally, the Chicago Urban League filed the fifth lawsuit on behalf of the resident voters in the then existing majority-minority African-American congressional districts. Each group of plaintiffs submitted a proposed redistricting plan to the court for consideration.[19] All five lawsuits were consolidated into a single proceeding for trial.

The *Hastert* court conducted a two day trial beginning on October 7, 1991. Due to time constraints imposed by the 1992 election filing deadlines, the court streamlined the proceedings "in a manner that would still enable the parties to present a complete record on the serious constitutional matters at issue."[20] *Hastert*, 777 F. Supp. at 639. To that end, the court "directed the parties to submit their evidence in the form of affidavits and depositions, supplemented by any maps and statistical data . . . ." *Id.* at 639-40. The court limited the parties to a single proposed plan and map at trial, and entertained argument mainly through post-trial briefs. *Id.* at 640.

As a result of these streamlined proceedings, the parties resolved numerous issues through negotiation, concession, and stipulation. In so doing, the parties not only effectively supplanted the *Hastert* court's

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19 The *Hastert* court also permitted several individuals and organizations to intervene. Of these plaintiffs-intervenors, only then Representative Augustus Savage (D-IL; 2d Dist.) and the Harold Washington Party, acting in tandem, submitted a proposed redistricting map to the court. *Hastert*, 777 F. Supp. at 639. Thus, at the onset of the case, six different redistricting plans had been submitted to the court.

20 The court's goal was to issue its judgment "in a timely fashion to allow any of the participants adequate time for appeal to the Supreme Court prior to the December 16, 1991 filing deadline for the March 17, 1992 congressional primary elections." *Hastert*, 777 F. Supp. at 639.

fact finding role in many instances but also narrowed the number of substantive legal issues the court needed to decide. The court explained:

The parties worked diligently during discovery and the two-day trial to resolve numerous areas of significant disagreement in their competing plans. The pre-trial proceedings were marked by a succession of amendments to the principal redistricting proposals, with each of the new amended plans incrementally eliminating a complex area of potential conflict. *Id.* at 640. The magnitude of complex issues resolved by stipulation among the parties was unprecedented.[21] According to the *Hastert* court, not only did all of the parties agree throughout the proceedings that "the population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district," but they also reached an agreement prior to trial as to "the configuration of the proposed Hispanic majority district." *Id.* These pre-trial agreements between the parties had significant consequences on the conduct and outcome of the trial.

By reaching an agreement on the configuration of a proposed Hispanic district, the parties greatly simplified a perplexing issue. Indeed, *an agreement on this issue may be the crucial factor in facilitating the creation of an Hispanic district.* The agreement on the proposed Hispanic district removed the Hispanic contingent among the *Nieves* plaintiffs as active participants at trial.[22] *Id.* (emphasis added).

The *Hastert* court summarized the effect of the streamlined proceedings as follows:

As a consequence of the admirable efforts of counsel to come to an

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21 The pre-trial negotiations and agreements between the diverse parties were highly reminiscent of the compromising which characterizes the legislative process. In fact, if the parties were aligned on partisan political grounds, the alignment would resemble the composition of the state legislature (*i.e.*, the *Hastert* Republicans versus the *Rosebrook et al.* Democrats). Because of this partisan alignment, agreements reached by the parties had an important value beyond merely advancing the litigation's timetable. More specifically, the partisan alignment supported the reasonable inference that the bi-partisan agreements and stipulations reflected the beliefs of the General Assembly.

agreement on many issues, the trial focused primarily on the redistricting proposals of the *Hastert* and *Rosebrook* plaintiffs. We are left primarily with the task of determining which of the two proposed plans best meets the goals and criteria, both constitutional and non-constitutional, enumerated by the Supreme Court. *Id.* In short, the parties' pre-trial negotiations and agreements significantly narrowed the court's role. Essentially two tasks (relevant to this lawsuit) remained for the *Hastert* court: first, to analyze the revised *Hastert* and *Rosebrook* redistricting plans to determine which plan better satisfied constitutional standards;[23] and second, to determine whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority-minority district.

A. The Court's Constitutional Analysis

The proposed *Hastert* and *Rosebrook* redistricting plans were substantially similar in purpose, design and configuration but differed in the final allocation of the electorate within the twenty congressional districts.[24] The *Hastert* court therefore set forth to determine which proposed plan better satisfied the governing constitutional requirements of population equality, fairness to minority voting rights (*i.e.*, vote dilution), and political fairness.

The court first assessed the two proposed plans under the one person, one vote theory of representation articulated in *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964). The court ultimately concluded

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22 In addition to the parties' agreement about the creation and configuration of an Hispanic majority-minority district, the parties also resolved via stipulation the configuration of the Second Congressional District (a super-majority African-American Congressional District) and the location of certain downstate minority communities. *Id.*

23 It was a foregone conclusion that the 1980 redistricting plan was unconstitutional.

> All parties are in agreement that the existing congressional district plan is both unconstitutional and impracticable. Consequently, we proceed directly to an evaluation of the constitutional and legal merits of the proposed *Hastert* and *Rosebrook* plans.

Hastert, 777 F. Supp. at 641. The court analyzed the *Hastert* third amended redistricting plan and the *Rosebrook* first amended redistricting plan. *Id.* at 641 n.8.

24 According to the court, "protection of the interests of minority communities was a driving force for both the *Hastert* and *Rosebrook* plaintiffs." *Hastert*, 777 F. Supp. at 646 n.19. As a result of the bipartisan pre-trial negotiations, no minority group objected to the proposed revised *Hastert* or *Rosebrook* redistricting plans. *Id.*

that the proposed *Hastert* plan, with a total deviation of 0.00017% from the ideal congressional district population of 571,530, better advanced the one person, one vote principle than the proposed *Rosebrook* plan, which had a total deviation of 0.00297%. *Hastert*, 777 F. Supp. at 644.

The court next evaluated the proposed plans for their fairness to the voting rights of racial and language minorities. *Hastert*, 777 F. Supp. at 645. This inquiry required the court to assess whether either of the proposed redistricting plans had the discriminatory effect of diluting the power of minority votes.[25] The court found that neither proposal diluted minority voting power and ultimately concluded that the proposed *Hastert* plan better satisfied this constitutional criterion.[26]

Finally, the court assessed the proposed plans for political fairness, meaning whether one or both of the proposed plans had the effect of discriminating against an identifiable political group. *Hastert*, 777 F. Supp. at 655, 656. Both plans sought to address the then existing discrepancy between Democratic and Republican congressional representation.[27] The *Rosebrook* plaintiffs argued, however, that the *Hastert* plan would result in a politically unfair redistribution of

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25 Vote dilution occurs either by fragmenting large concentrations of minority populations and dispersing them into separate political districts, or by concentrating minorities into districts where they constitute an excessive majority. *Hastert*, 777 F. Supp. at 646 (*citing Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 106 S. Ct. 2752, 2764 n.11 (1986)).

26 The 1981 court order which reapportioned Illinois' congressional districts in accordance with the 1980 decennial census results created three "super-majority" African-American congressional districts; namely, the First, Second and Seventh Congressional districts. *See Hastert*, 777 F. Supp. at 646-47 (*citing In re Congressional Dists. Cases*, No 81 C 3915, slip op. (N.D. Ill. Nov. 23, 1981)). These districts contained the sixty-five percent (65%) minority population and sixty percent (60%) voting age population generally regarded as the necessary threshold for creating a "safe" minority district. *Id.* at 647-48 & n.22.

The proposed *Hastert* and *Rosebrook* plans each retained these three majority African-American congressional districts, despite the "major demographic changes during the 1980's" that necessitated "radical alterations in the configuration of the existing minority districts." *Hastert*, 777 F. Supp. at 646 n.19. The three super-majority African-American districts were retained as a result of bipartisan agreement. *See id.*

The *Hastert* court ultimately concluded that the proposed *Hastert* plan better addressed fairness concerns for minority voting power because its allocation of the African-American population within the three super-majority congressional districts more closely comported with the 65%-60% threshold than the *Rosebrook* plan's allocation. *Hastert*, 777 F. Supp. at 648, 655. The court likewise concluded

congressional seats. *Id.* at 656, 658. After an extensive analysis, the court rejected this contention, concluding that "[t]he data suggests that the *Hastert* plan is likely to yield a distribution of seats across party lines that mirrors the statewide partisan makeup of the voting citizenry . . . ." *Id.* at 659. It further concluded that the *Hastert* plan was politically more fair. *Id.*

B.The Court's Section 2 Voting Rights Act Analysis

As previously established, all of the parties initially agreed that Section 2 of the Voting Rights Act "mandated" the creation of an Hispanic majority district and further agreed to the general configuration of such a district. As a result, the proposed configurations of the Hispanic district in the *Hastert* and *Rosebrook* plans were virtually identical: the district would link the two densely populated Hispanic communities on Chicago's near northwest and near southwest sides though a narrowly drawn, C-shaped connector that wound around the western edge of the Seventh Congressional District.[28] The *Hastert* court concluded that the proposed Hispanic district had an "extraordinary appearance" that was "not unlike a Rorschach blot turned on its side."[29] *Hastert*, 777 F. Supp. at 648 n.24. Even though all of the parties agreed to this extraordinary configuration, the court declined to "accept this conclusion without scrutiny." *Id.* at 648. It therefore undertook to determine whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority district.

A minority group seeking the creation of a majority-minority district under Section 2 must "make a threshold showing that it is: (1)

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that the *Hastert* plan, which created an Hispanic majority district with a 65.03% total and 59.18% voting age Hispanic population, was "marginally superior" to the *Rosebrook* plan, which contain an Hispanic majority district with corresponding concentrations of 65.00% and 59.15%. *Id.* at 651, 655.

27 After the 1990 election, the Democrat members of the Illinois congressional delegation outnumbered their Republican counterparts fifteen (15) to seven (7).

28 The two Hispanic enclaves were separated by the Seventh Congressional District, which runs in a roughly east-west direction along Chicago's central latitudes from Lake Michigan to the western suburbs. *Hastert*, 777 F. Supp. at 648 n.24.

29 It further observed that the proposed configuration of the Hispanic Fourth Congressional District made the "bizarre" configuration of New Jersey's 1982 congressional reapportionment plan in *Karcher v. Daggett*, 462 U.S. 725, 744-65, 103 S. Ct. 2653, 2667-78 (1983) (Stevens, J., concurring), appear "acceptable by comparison." *Id.*

sufficiently large and geographically compact to constitute a majority in a properly drawn district; (2) politically cohesive; and (3) that racial bloc voting typically frustrates the election of the minority group's preferred candidate." *Hastert*, 777 F. Supp. at 649 (*citing Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766). The court determined that the Chicago/Cook County Hispanic community satisfied each of these threshold requirements.

The court made the following findings of fact to support its conclusion that the Chicago/Cook County Hispanic community was "sufficiently large and geographically compact to constitute a single district majority." *Hastert*, 777 F. Supp. at 649. First, the 1990 census reported the Hispanic population in Chicago at 545,852, a 29.33% increase over the 1980 total. *Id.* Second, "[m]ost of the Chicago/Cook County Hispanic population is clustered in two dense enclaves, one on Chicago's near northwest side and one on the near southwest side." *Id.* Third, the two enclaves are less than one mile apart at their closest point. *Id.* Fourth, this separation resulted from exogenous physical and institutional barriers -- specifically, the east-west Eisenhower Expressway, the University of Illinois-Chicago Circle campus, and various major medical institutions -- and thus did not indicate the existence of two distinct communities. *Id.* & n.25.

To support its conclusion that the Chicago/Cook County Hispanic community was politically cohesive, the court adopted the findings of cohesiveness made by two federal courts in the early 1980s in cases where the Hispanic community challenged discriminatory redistricting practices at the state and local levels. *Hastert*, 777 F. Supp. at 650 (*citing Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied* 471 U.S. 1135, 105 S.Ct. 2673 (1985) (Chicago aldermanic redistricting plan); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (three judge panel) (state legislative redistricting plan), *supplemented* 574 F.Supp. 1147 (N.D.Ill.), *supplemented* 574 F. Supp. 1161 (N.D. Ill. 1983)). The court further found that the voting bloc patterns of the Hispanic community also demonstrated its political cohesiveness. *Id.* More specifically, the court found that "[s]ingle and bivariate regression analysis of voting patterns in Chicago precincts demonstrate significant ethnic bloc voting patterns." *Id.* Finally, the court found that the third threshold factor was fulfilled because the paucity of Hispanic officials in city and state-wide elected political offices compelled "the finding that ethnic bloc voting patterns

have thwarted the political interests of the Hispanic community." *Id.*

Having found the three threshold requirements satisfied, the court then considered the merits of the claimed need for an Hispanic majority-minority district under "the totality of the circumstances test." *Hastert*, 777 F. Supp. at 649. The relevant factors generally considered under the totality of the circumstances test include

> a history of official discrimination relating to minority political participation; the extent of racially polarized voting practices; the extent to which certain voting practices and procedures with discriminatory effects have been employed in the past; the exclusion of the minority group from the candidate slating process; the extent to which the minority group bears the effects of past discrimination in education, employment and health services which hinder their ability to effectively participate in the political process; the use of racial appeals in political campaigns; the extent to which minorities have been elected to office; and the lack of responsiveness by elected officials to particular minority needs.

Id. (citations omitted). However, rather than making its own findings of fact with respect to these factors, the court adopted the Seventh Circuit's findings concerning the Chicago Hispanic community set forth in *Ketchum v. Byrne*, the Section 2 Voting Rights Act challenge of the 1982 Chicago aldermanic redistricting plan. *Id.* Based on a "judicially recognized history of discrimination, both past and present, against the Chicago Hispanic community and its attendant impact on effective political participation and representation," the *Hastert* court concluded that an Hispanic majority district was warranted under *Gingles*. *Id.* The court further concluded that the "odd configuration" of the majority-minority Hispanic Fourth Congressional District was necessary to accommodate the creation of the Hispanic and the three African-American majority-minority districts "dictated under the Voting Rights Act." *Id.* The court therefore concluded that "the configuration has been drafted to *satisfy* constitutional and statutory goals and principles." *Id.* (emphasis in original).

III. King's Constitutional Challenge of the Hastert Court's Decision

As previously established, King contends that the boundaries of the

majority Hispanic Fourth Congressional District were drawn on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. The idea that a legislative redistricting plan that segregated the electorate on the basis of race might violate the Equal Protection Clause first surfaced in the 1960s. *See Gomillion v. Lightfoot*, 364 U.S. 339, 349, 81 S. Ct. 125, 131 (1960) (Whittaker, J., concurring) (plan to redefine city's borders to place Negro voters outside of city limits was an unlawful segregation of citizens on basis of race in violation of the Equal Protection Clause); *Wright v. Rockefeller*, 376 U.S. 52, 56, 84 S. Ct. 603, 605 (1964) (congressional redistricting plan that allegedly segregated eligible voters by race and place of origin was challenged as a violation of the Equal Protection Clause). The Supreme Court, however, did not formally recognize an Equal Protection Clause challenge to redistricting plans until its 1993 decision in *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993), where it recognized a claim challenging the constitutionality of a bizarrely drawn but facially race-neutral redistricting plan. Two years later in *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475 (1995), the Supreme Court further defined the contours of this Equal Protection Clause claim. Since *Shaw* and *Miller* were both decided after *Hastert*, the *Hastert* court did not have occasion to consider whether the extraordinary configuration of the Fourth Congressional District may have violated the Equal Protection Clause. Accordingly, the *Hastert* court's conclusion that the district's extraordinary configuration was necessary to "satisfy constitutional principles" is rendered circumspect by the change in governing law and is therefore subject to *de novo* review.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const., Amdt. 14, §1*. The clause's "central mandate is race neutrality in governmental decisionmaking." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2482. The prohibitions of the Equal Protection Clause extend not only to laws that explicitly distinguish between individuals on the basis of race but also to laws that appear racially neutral but are "unexplainable on grounds other than race." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2824, 2825 (*quoting Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564 (1977)); *accord Miller*, 115 S. Ct. at 2483. Although application of the Equal Protection Clause's mandate

is often difficult, "the basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"[30] *Miller*, ___ U.S. at ___, 115 S. Ct. at 2482 (*quoting Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748 (1987)). Laws that classify citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest. *Id.* (citations omitted); *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2825.

In *Shaw*, the Supreme Court held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." ___ U.S. at ___, 113 S. Ct. at 2828. The appearance of the reapportioned district is therefore an important factor in ascertaining whether the electorate was impermissibly segregated on the basis of race. *Id.* at ___, 113 S. Ct. at 2827 ("appearances do matter" in redistricting).

The *Hastert* court readily observed that the majority Hispanic Fourth Congressional District was bizarrely configured and "resembled a Rorschach blot turned on its side." 777 F. Supp. at 648 n.24. Although the *Hastert* court is presumed to have acted constitutionally in issuing its reapportionment order, *see United States v. Paradise*, 480 U.S. 149, 183, 107 S. Ct. 1053, 1073 (1987);[31] *see also Miller*, ___ U.S. at ___, 115 S. Ct. at 2488 (until a claimant makes a showing sufficient to support an allegation of race-based districting, the court must presume that the legislature acted in good faith), the presumption is

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30 The Supreme Court has never held that "race-conscious state decisionmaking" is impermissible in all circumstances. *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2824, 2826. The *Miller* Court further explained:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. '[W]hen members of a racial group live together in a community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.' *Shaw*, *supra*, at ___, 113 S. Ct. at 2836. But where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates. *Id.* at ___, 113 S. Ct. at 2827: . . . .

Miller, ___ U.S. at ___, 115 S. Ct. at 2490.

necessarily limited by the scope of the court's constitutional analysis. Since the *Hastert* court did not analyze whether the oddly drawn Fourth Congressional District met the requirements of the Equal Protection Clause, a presumption of constitutionality does not arise and no deference is accorded to the *Hastert* court on this issue.

There is no dispute that the *Hastert* court considered race and ethnicity in its attempt to further the goals of the Voting Rights Act.[32] *Hastert*, 777 F. Supp. at 650-51. The question is whether in attempting to remedy a Section 2 Voting Rights Act violation, the *Hastert* court adopted a redistricting plan that apportioned the electorate on the basis of race and ethnicity in violation of the Fourteenth Amendment's Equal Protection Clause. Accordingly, the extraordinarily configured Fourth Congressional District must be subjected to an Equal Protection Clause analysis to determine its constitutionality.

A. Standards for Equal Protection Clause Analysis of Redistricting Plan

"The essence of [the] Equal Protection Clause claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2485. When the State uses race in this manner, it has engaged in racial gerrymandering (*i.e.*, "the deliberate and arbitrary distortion of district boundaries . . . for racial purposes"). *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2823 (*citing Davis v. Bandemer*, 478 U.S. 109, 164, 106 S. Ct. 2797, 2826 (1986) (Powell, J., concurring in part and dissenting in part)). To determine whether a redistricting plan has been racially gerrymandered, the court must focus on the role that race played in the drawing of the district's borders. The court, however, does not

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31 In *Paradise*, the Court stated:

> We must acknowledge the respect owned a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

480 U.S. at 183, 107 S. Ct. at 1073 (*quoting Louisiana v. United States*, 380 U.S. 145, 154, 85 S. Ct. 817, 822 (1965)).

32 The court specifically acknowledged that "[r]acial and ethnic considerations are appropriate to drawing districts to advance the goals of the Voting Rights Act." *Hastert*, 777 F. Supp. at 650-51 (*citing United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S. Ct. 996 (1977)).

make this assessment in a vacuum.

1. Determining the Role of Race in the Redistricting Plan

The court's analysis begins by recognizing two fundamental principles of redistricting. First, race is one of many demographic factors inherently considered in the redistricting process. As the Supreme Court observed in *Shaw*,

> redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.

___ U.S. at ___, 113 S. Ct. at 2826; *Miller*, ___ U.S. at ___, 115 S. Ct. at 2487. Second, legislatures also generally consider "traditional districting principles" -- compactness, contiguity, and respect for both political subdivisions and communities of shared interests -- in deciding how to reapportion district boundaries. The court's task is to isolate the role that race played in redistricting vis-a-vis the traditional race-neutral districting principles and other non-racial demographic factors. The court's undertaking is difficult in and of itself;[33] it is only made harder by the complex interplay of forces that enter a legislature's redistricting calculus. *Miller*, ___ U.S. at ___, 115 S. Ct. at 2488. In the end, however, only two conclusions are possible: first, race was the predominate consideration that guided the creation of the district; or second, race was but one of many factors of equal or greater weight that guided the creation of the district.[34]

If the court determines that race played the predominate role in drawing the district's boundaries, then the redistricting plan was racially gerrymandered. *See Miller*, ___ U.S. at ___, 115 S. Ct. at 2488-90; *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2824-28. Race plays the predominate role when the legislature has subordinated all other considerations, including the race-neutral traditional districting principles (*i.e.*, compactness, contiguity, and respect for both political subdivisions and communities of shared interests), to racial considerations in determining the district's configuration. *Id.* On the other hand, if the court determines that race was merely one factor among many other race-neutral factors accorded equal or greater

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33 "The distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*, 115 S. Ct. at 2487.

significance by the legislature in drawing the district's boundaries, then race was not the predominate factor and the redistricting plan is not subject to strict scrutiny. *See Miller*, ___ U.S. at ___, 115 S. Ct. at 2488 ("where these [traditional districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines'") (*quoting Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994) ("we conclude that in the context or redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required"), *aff'd in part and appeal dismissed in part* ___ U.S. ___, 115 S. Ct. 2637 (1995). In this manner, the traditional race-neutral districting principles function as "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827.

A district does not need to be bizarrely shaped to warrant constitutional review. *See Miller*, ___ U.S. at ___, 115 S. Ct. at 2486. According to the Supreme Court,

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.[35]

Id. Rather, parties may rely on evidence other than bizarreness to establish race-based districting. *Id.* (citations omitted).

The party challenging the district's constitutionality has the burden of persuasion to prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2488. The predominance of race in redistricting may be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to the legislative purpose." *Id.* In sum,

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34 One could argue that the presence of racially polarized voting represents a prior determination by the electorate that race overrides other issues in the political algebra of the community.

> a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id.

2. Strict Scrutiny

Once a plaintiff has proven that racial considerations predominated, the court must subject the redistricting plan to strict scrutiny -- the "most rigorous and exacting standard of constitutional review." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2490. There are two prongs to this examination: first, the racial classification must be justified by a compelling governmental interest; and second, the means chosen by the State must be narrowly tailored to achieve that goal. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847 (1986) (plurality opinion) (citations omitted). Thus, to satisfy strict scrutiny, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2490 (*citing Shaw*, ___ U.S. at ___, 113 S. Ct. at 2829-2832; *City of Richmond v. J.A. Croson & Co.*, 488 U.S. 469, 494, 109 S. Ct. 706, 722 (1989) (plurality opinion); *Wygant*, 476 U.S. at 274, 280 & n.6, 106 S. Ct. at 1847, 1850 & n.6 (plurality opinion); *cf. Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S. Ct. 2097, 2114 (1995)). Accordingly, once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified. *See Miller*, ___ U.S. at ___, 115 S. Ct. at 2490 (*citing Shaw*, ___ U.S. at ___, 113 S. Ct. at 2839-32); *Vera v. Richards*, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995); *but see Shaw v. Hunt*, 861 F. Supp. 408, 435-36 (E.D.N.C. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995).[36]

3. Subjecting a Court's Redistricting Order to Strict Scrutiny

The above standards notwithstanding, the defendant-intervenors

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35 The *Miller* Court later reiterated this point:

> In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof of evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness.

___ U.S. at ___, 115 S. Ct. at 2488.

argue that a court-ordered redistricting plan should not be subjected to strict scrutiny where, as in *Hastert*, the plan is imposed to remedy a constitutional or statutory violation. The defendant-intervenors contend in this regard that the Supreme Court's decisions in *Shaw* and *Miller* do not apply to this case because those decisions involved constitutional challenges to *legislatively* created congressional redistricting plans rather than a *court*-ordered redistricting plan. This distinction is without merit for three reasons.

First, the Supreme Court has historically recognized that in some respects, court-ordered remedial redistricting plans must be subject to stricter review than plans drawn by state legislatures. *See Upham v. Seamon*, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521-22 (1982) (per

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36 In *Shaw v. Hunt*, the district court on remand (from *Shaw v. Reno*) recognized a distinction between the burdens of production and of proof in a strict scrutiny analysis. The court reasoned that once a plaintiff proved that race was the predominate consideration and thereby triggered a strict scrutiny analysis, the burden of *production* shifted to the State to demonstrate that its use of race was justified by a compelling governmental interest. *See Shaw*, 861 F. Supp. at 435-36. However, the court concluded that the plaintiff at all times retained the ultimate burden of *persuasion* to establish the constitutional violation; as such, the plaintiff had the burden to prove that the State's use of race was not narrowly tailored to accomplish the asserted compelling interest. *Id.* This ruling has been appealed to the Supreme Court.

Although not explicitly stated, the defendant-intervenors agree with the district court's conclusion in *Shaw* on remand. (*See* DOJ Post-Trial Mem., at 3). The defendant-intervenors, like the *Shaw* court on remand, rely on Justice O'Connor's concurrence in *Wygant* to support their position. In *Wygant*, a plurality of Justices held that racially based lay-off preferences contained in a collective bargaining agreement violated the Equal Protection Clause. In her concurrence, Justice O'Connor wrote in pertinent part:

> [I]t is incumbent upon the [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [defendants'] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan was not sufficiently 'narrowly tailored.' Only by meeting this burden [can] the plaintiffs establish a violation of their constitutional rights.

476 U.S. at 293, 106 S. Ct. at 1857 (O'Connor, J., concurring). The other Justices forming the Court's plurality, Chief Justice Burger and Justices Powell and Rehnquist, did not adopt this burden-shifting regimen but instead concluded only that "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program." *Id.* at 277-78, 106 S. Ct. at 1849.

This court declines to follow the burden-shifting approach (reminiscent of Title VII cases) advocated by Justice O'Connor in *Wygant* and adopted by the *Shaw*

curiam); *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S. Ct. 2493, 2497 (1978); *Connor v. Finch*, 431 U.S. 407, 414-15, 97 S. Ct. 1828, 1833-34 (1977). These courts have employed a more stringent standard to review court-ordered redistricting plans because reapportionment is a uniquely legislative task for which the court is not ideally suited. *See Connor*, 431 U.S. at 414-15, 97 S. Ct. at 1833-34. There, the Supreme Court explained:

> Legislative reapportionment is primarily a matter for legislative consideration and determination, . . . for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. Where a legislature has failed to reconcile these conflicting state and federal goals, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political

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court on remand. First, the *Shaw* court on remand allocated the burden of proof without the benefit of the Supreme Court's decision in *Miller*. As previously noted, the *Miller* Court concluded that the "State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." The *Miller* Court thus imposed upon the State the dual burdens of demonstrating that a compelling state interest existed *and* that the challenged redistricting plan was "narrowly tailored" to accomplish that interest. This court will follow *Miller*, the controlling law at this time. *See also Bernal v. Fainter*, 467 U.S. 216, 227, 104 S. Ct. 2312, 2319 (1973) ("[t]o satisfy strict scrutiny, the State must show that [the challenged statute] furthers a compelling state interest by the least restrictive means practically available"); *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855 (1973) ("In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."). Second, Justice O'Connor, writing for the Court in *Adarand*, acknowledged "[t]he Court's failure to produce a majority opinion in *Bakke*, *Fullilove* and *Wygant* left unresolved the proper analysis for remedial race-based government action." *Adarand*, ___ U.S. at ___, 115 S. Ct. at 2109. Finally, as a matter of policy, the State should bear the burden of proof once strict scrutiny is required since it is the State, and not the private litigant, that is promoting racially based action with all of its attendant harms. *See, e.g., Miller*, ___ U.S. at ___, 115 S. Ct. at 2486 (outlining potential harms of racially gerrymandered redistricting plans); *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827-28 (same); *Wygant*, 476 U.S. at 273, 106 S. Ct. at 1846 ("This court has 'consistently repudiated distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'") (*quoting Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967)).

> authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly and in a manner *'free from any taint of arbitrariness or discrimination.'*

Id. at 415, 97 S. Ct. at 1834 (citation omitted) (emphasis added); *accord Wise*, 437 U.S. at 540, 98 S. Ct. at 2497.[37] However, the stricter standard for court-ordered reapportionment plans applies "only to remedies required by the nature and scope of the violation. 'The remedial powers of an equity court must be adequate to the task, but they are not unlimited.'" *Upham*, 456 U.S. at 42, 102 S. Ct. at 1522 (*quoting Whitcomb v. Chavis*, 403 U.S. 124, 161, 91 S. Ct. 1858 (1971)). Thus, the legislative versus judicial distinction advocated by the defendant-intervenors is of no consequence where, as in *Hastert*, a court adopted a redistricting plan to remedy a constitutional or statutory violation. Such a court-ordered plan must be strictly scrutinized to ensure that the remedy itself is appropriate and constitutional.[38]

Second, where a State legislature has abdicated its redistricting duty to the court system, the courts are forced to act in a pseudo-legislative capacity. If a lesser standard is applied to court-ordered redistricting plans under these circumstances, the checks and balances inherent in our constitutional framework will be gravely injured in this discrete area. Subjecting a court-ordered plan to strict scrutiny is thus necessary to restore constitutional equipoise. In addition, applying the same standards to both court-ordered and legislatively created redistricting plans is further warranted by the disturbing and growing trend of gross dereliction of duty by State legislatures that are all too ready to leave the political thicket of redistricting to the federal courts.[39] Applying a lesser standard to a court-ordered redistricting plan would

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37 "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts 'will be held to stricter standards than will a state legislature.'" *Wise*, 437 U.S. at 540, 98 S. Ct. at 2497 (*quoting Connor*, 431 U.S. at 424, 97 S. Ct. at 1833).

only reward such cowardice and encourage more state legislatures to forsake their duties and seek political refuge behind the court's robes. Protecting the integrity of the court requires application of an equal standard of review where, as here, the court is forced by legislative nonfeasance to perform what is a uniquely legislative task.

Third, the Supreme Court in *Adarand* most recently held that all racial classifications imposed by any governmental actor -- whether federal, state or local -- must be analyzed by a reviewing court under strict scrutiny. ___ U.S. at ___, 115 S. Ct. at 2117. Justice O'Connor, writing for the Court, observed that the Court's prior decisions through *Croson* had established three general propositions with respect to governmental racial classifications:

> First, skepticism: '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.' Second, consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification . . . *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: '[e]qual protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment.'

Adarand, ___ U.S. at ___, 115 S. Ct. at 2111 (citations omitted).

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38 The Democratic National Committee argues in its *amicus* brief that the Supreme Court has historically distinguished between court-ordered and legislative plans, citing two examples: first, unlike redistricting plans drawn by state or local governments subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c, remedial redistricting plans adopted by a federal court do not need to receive preclearance from the Attorney General or a special three-judge federal court in the District of Columbia; and second, "when a federal court must devise its own remedial plan, it is necessary to determine whether the proposed remedial plan is 'court ordered' or 'legislative', to determine whether at-large districts may be included." (DNC Mem., at 10-11). Notwithstanding the facts that the theory underpinning the first example is falsifiable since §5's preclearance requirements do not apply to all State legislatures and that the second example implicitly recognizes that a court can act in a legislative capacity in fashioning a redistricting plan, the DNC's position is positively unavailing in light of the Supreme Court's pronouncements in *Upham*, *Wise*, and *Connor* (none of which was properly cited in the DNC s brief).

39 State legislatures in California, Florida, Illinois (repeatedly), and most recently Georgia, among others, have inexcusably abandoned their constitutional redistricting duties to the courts.

Justice O'Connor concluded:

> Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that *any governmental actor* subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Id. (emphasis added). Although *Adarand* did not involve a challenge to a court-ordered racial classification, the scope of the Court's conclusion must be extended to include the judicial branch. See, *e.g.*, *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2832 ("Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; . . . . It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny."). Accordingly, strict scrutiny may be applied to court-ordered reapportionment plans drawn predominately on the basis of race.[40]

The defendant-intervenors and Democratic National Committee, as *amicus curiae*, nonetheless argue that a lesser standard of review should be applied to court-ordered remedial redistricting plans, *citing DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994).[41] This case is both factually and legally distinguishable. In 1991, the California Supreme Court appointed a panel of Masters to develop and recommend a redistricting plan after the governor vetoed the legislature's reapportionment plan and legislative malaise set in. 856 F. Supp. at 1410. The Masters conducted public hearings and submitted a report and recommendation to the California Supreme Court, which the Supreme Court adopted. *Id.* (*citing Wilson v. Eu*, 1 Cal. 4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992)). A California registered voter subsequently challenged the court-ordered redistricting plan, claiming that it "relied on race-conscious reapportionment and diluted white voter strength in violation of the Equal Protection Clause

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40 In *Croson*, the Supreme Court observed that "[t]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493, 109 S. Ct. at 721. Citing this language, the defendant-intervenors argue that strict scrutiny is more suited for legislative action than federal court action. While this observation may be generally true, it is not without exception. In *Miller*, the Court concluded that a plaintiff could establish that racial

of the Fourteenth and Fifteenth Amendments." *Id.* The district court granted summary judgment for the State, concluding that the redistricting plan did not fall within the parameters of *Shaw v. Reno*.

The *DeWitt* court, citing with approval the California Supreme Court's findings in *Wilson v. Eu*, concluded that "[n]o bizarre boundaries were created" and that "the Master's Report sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act." 856 F. Supp. at 1413. The court framed the issue as follows:

> This case . . . involves the constitutionality of a redistricting plan that created majority-minority districts in a manner that was consistent with traditional redistricting principles, not based solely on race, and not involving extremely irregular boundaries. It involves the question left open by the Court in *Shaw*.

Id. The *DeWitt* court concluded that the plaintiff failed to state a claim for racial gerrymandering because

> [t]he Masters did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters . . . properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered. We agree with the California Supreme Court that the Masters' Report evidences a judicious and proper balancing of the many factors appropriate to redistricting . . . .

Id. It further held that "in the context of redistricting, where race is considered only in applying traditional redistricting principles along

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considerations predominated either through circumstantial evidence of shape and demographic factors or through direct evidence of the legislature's purpose. ___ U.S. at ___, 115 S. Ct. at 2488. Given these differing methods of proof, strict scrutiny would not "entail the in-depth examination of the federal court that ordered the plan" envisioned by the defendant-intervenors where a plaintiff relies on circumstantial evidence to challenge the court-ordered redistricting plan. In fact, it has already been determined in *Johnson v. Mortham*, that a court-ordered remedial congressional redistricting plan adopted in 1992 will be subjected to strict scrutiny under the standards articulated in *Miller*. *See Johnson*, ___ F. Supp. ___, 1995 WL 707856 (N.D. Fla. Nov. 20, 1995) (discussed in footnote 18 *supra*).

41 The United States Supreme Court summarily affirmed the decision in *DeWitt* on the same day that it issued its decision in *Miller v. Johnson*. *See* ___ U.S. ___, 115 S. Ct. 2637 (1995) (affirming *DeWitt* in part and dismissing the appeal in part).

with the requirements of the Voting Rights Act, . . . strict scrutiny is not required." *Id.* at 1415.

The Democratic National Committee reasons that since the Supreme Court summarily affirmed the decision in *DeWitt* on the same day that it decided *Miller v. Johnson*, it must have intended not to subject the court-ordered redistricting plan to the "predominant use of race test" announced in *Miller*. The DNC therefore speculates that if the Supreme Court had intended to subject a court-ordered plan to the same strict scrutiny applied in *Miller* to a legislatively enacted redistricting plan, the Court would have vacated the *DeWitt* decision and remanded it for further proceedings in light of *Miller*. Such a speculative inference is patently unreasonable given the *DeWitt* court's express findings that traditional race-neutral districting principles were not subordinated to racial considerations in the redistricting process. To the contrary, a much more reasonable (and indeed more probable) inference to be drawn from the timing and texts of the *Miller* and *DeWitt* decisions is that the *Miller* Court implicitly recognized the facts and holding of *DeWitt* when it wrote:

> Where these [traditional districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'

Miller, ___ U.S. at ___, 115 S. Ct. at 2488 (*citing Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827). *DeWitt* does not establish that court-ordered redistricting plans avoid strict scrutiny; rather, it completes the rule announced in *Shaw* and *Miller*. That is, strict scrutiny will only apply where racial considerations predominate over traditional race-neutral districting principles.

This court therefore concludes that since racial considerations predominated over all other factors in the configuration of the Fourth Congressional District adopted by the *Hastert* court (*see infra* section IV.B), the court-ordered plan must be subject to strict scrutiny.

B. Racial Considerations Predominated in Configuring the Fourth Congressional District

The Supreme Court in *Miller* identified two means of establishing that race predominated over all other considerations in the drawing of district boundaries; namely, circumstantial evidence of a district's shape and demographics or direct evidence of the legislative purpose.

Since the Illinois General Assembly did not create the majority-minority Hispanic Fourth Congressional District, King's only apparent recourse was to prove that the *Hastert* court adopted a racially based redistricting plan through circumstantial evidence. Establishing that racial considerations predominated over all of the other complex factors involved in redistricting through indirect, inferential evidence is an extremely difficult burden under any set of circumstances. Establishing that race predominated in a *court-ordered* redistricting plan would normally make this burden exponentially more difficult. Three factors, however, eased rather than enhanced the difficulty of King's burden: first, the *Hastert* court employed a unique process to select a redistricting plan; second, the *Hastert* court found that the Fourth Congressional District was bizarrely configured; and third, the *Hastert* court did not make any findings of fact to explain how and why the district's boundaries came to have such a bizarre configuration. The interplay of these three factors enabled King to fulfill his burden.

1. The Unique Process of Selecting a Redistricting Plan[42]

At the onset of the consolidated *Hastert* proceedings, the various litigants presented six different reapportionment plans to the court for consideration. Due to significant time constraints, the court did not have the option of bifurcating the proceedings to separately decide the legal issues (*e.g.*, the constitutionality of the existing plan; whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority district) and the appropriate remedy. The court thus was unable to conduct hearings (or appoint a Master to do the same) to consider the merits and constitutionality of each of these submitted plans. The court instead adopted streamlined discovery and trial procedures which facilitated and condoned the pre-trial resolution of disputed issues by the litigants. Two of these pre-trial agreements are particularly important to this analysis: first, the parties universally agreed that population and demographic changes "mandated the creation of an Hispanic majority district;" and second, the parties agreed in principle to the configuration of the proposed Hispanic district. As a result of other pre-trial agreements, the parties revised

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42 Although this court has previously set-forth a detailed summary of the *Hastert* court proceedings, *see supra* part III, the *Hastert* court's methodology bears repeating to demonstrate more precisely the consequences of that methodology on this court's decision.

and eliminated competing redistricting plans until only two remained for the court's consideration. The court's primary task at trial was thus narrowed to determining which of these two revised plans better met constitutional and statutory requirements. Since the configuration of the Fourth Congressional District was virtually the same regardless of which proposed plan the court adopted, the district's bizarre shape was effectively determined by the *litigants* and not the court.[43] Under these circumstances, the litigants' intentions and purpose become an important source of information on the role that race played in the configuration of the boundaries' borders.[44]

2.The Bizarrely Drawn District

The Fourth Congressional District is an uncouth configuration: a Rorschach ink blot turned on its side; a wobbly eighth note; an unusually shaped bar-bell. However it is characterized, its shape is bizarre. The District's extremely irregular configuration creates a strong inference (but not a presumption) that its shape rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. *See, e.g., Miller*, ___ U.S. ___, 115 S. Ct. at 2486 (shape may be persuasive circumstantial evidence that race for its own sake was the dominant rationale in the drawing of district lines); *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2826-2828; *Johnson v. Mortham*, ___ F. Supp. ___, 1995 WL 707856, at *20 (N.D. Fla. Nov. 20, 1995) (evidence of bizarre configuration by itself was sufficient to establish racial gerrymander).

3. The Lack of Findings of Fact by the Hastert Court

An important effect of the streamlined *Hastert* pre-trial and trial procedures was the transfer of many of the court's fact finding

43 While it is true that the *Hastert* court affected the shape of the Fourth Congressional District by selecting the proposed *Hastert* plan over the *Rosebrook* plan, the demonstrable impact of that choice on the configuration of the district's boundaries was *de minimis*. The *Hastert* court thus did not understate the impact of the parties' pre-trial agreement on district's configuration when it observed that this agreement may have been "the crucial factor in facilitating the creation of an Hispanic district."

44 The defendant-intervenors caution against relying extensively on such evidence because the court ultimately selected the plan and its motivations for doing so may have differed substantially from the drafters' intentions. This court will defer to the reasons expressed in the *Hastert* opinion concerning why that court adopted the proposed *Hastert* plan over the proposed *Rosebrook* plan. Where, however, the *Hastert* court did not make any specific findings that contradict or undermine the expressed intent of the litigants, this court will consider evidence relating to their intent.

responsibilities to the parties. As a result of these streamlined procedures, a significant part of the evidentiary portion of the trial was eliminated through stipulation. The *Hastert* court frequently acknowledged that the parties had resolved complex issues via stipulation but the court failed to address or recite the factual predicate underpinning the stipulations. While this practice may have been appropriate under the pressing time constraints in 1991, it has had the collateral effect of limiting the factual record upon which this court must rely to evaluate King's claim.

This court's task is to determine what role racial considerations played in the configuration of the Fourth Congressional District's boundaries. In doing so, this court is confined to the factual determinations made by the *Hastert* court as set forth in that court's opinion. This court cannot retroactively supplement the *Hastert* court's factual record. As such, unless the *Hastert* court made a specific finding (*e.g.*, socio-economic factors were considered in drawing the district's boundaries), the default rule must be that the *Hastert* court did not consider the role that the particular factor played in the district's bizarre configuration. This default rule is required to ensure that the court-ordered redistricting plan is "free from any taint of arbitrariness or discrimination." *See Connor*, 431 U.S. at 415, 97 S. Ct. at 1834.

4. Application

Almost from the outset of the *Hastert* litigation, the litigants agreed to create an Hispanic majority-minority district. This agreement is not, however, sufficient to establish that racial considerations predominated over all other factors in the creation of the district's actual borders. The focus here is not on the justifications supporting the creation of an Hispanic majority district but rather on how the specific boundaries of the Fourth Congressional District came to be drawn. While the *Hastert* opinion provides a broad perspective on the factors facilitating the adoption of the Hispanic district, the court did not make any specific findings explaining how or why the district's specific boundaries came to exist. This omission notwithstanding, the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

First, the pragmatic requirements of creating *four* super-majority minority districts located principally within the City of Chicago

necessarily forced the map makers to draw district boundaries with race as a major consideration.[45] As the *Hastert* court revealed, the goal of the litigants was to create a new Hispanic majority district while maintaining the three African-American super-majority districts (*i.e.*, the First, Second and Seventh Congressional Districts) created by federal court order in 1981. Substantial demographic changes in the city's minority population during the 1980s made accomplishing this goal a particularly difficult task. While the Hispanic population generally grew, the three majority African-American districts created in 1981 experienced significant losses in population, especially African-American population. *See Hastert*, 777 F. Supp. at 646 n.19. In addition, the African-American population generally moved south. *Id.* These demographic changes caused the litigants to "radically alter" the configuration of the three 1981 African-American districts to ensure that an African-American population of 65% or more could be maintained in each of the First, Second and Seventh Congressional Districts.[46] *Id.* Since the city's minority population is finite and the constitutional requirement of one person-one vote unforgiving in its application, the radical alteration of the three African-American super-majority districts necessarily affected the boundaries of the Hispanic majority district. The result was inevitable: a bizarrely drawn Hispanic district whose boundaries were created to maximize its Hispanic population while permitting the African-American super-majority districts with which it shared common borders to maximize their respective African-American populations in order to achieve the desired 65% minority population threshold in each district.[47]

Second, the only factor that consistently explains the precise configuration of the district's boundaries is race. The Defendant-intervenors correctly point out that traditional non-racial districting principles were considered in the configuration of the Fourth Congressional Districts. Affidavits submitted into evidence establish that the litigants, at least at the outset of the *Hastert* litigation, considered factors such as compactness, contiguity, respect for political

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45 As previously noted, a super-majority African-American district contains an African-American population that represents 65% of the district's total population and 60% of its voting age population. A super-majority Hispanic district contains the same ratios of Hispanic population. According to the *Hastert* court, these population ratios are required to ensure a safe minority congressional seat. 777 F. Supp. at 647 & n.20.

subdivisions and communities of shared interests in the initial configuration of the Fourth Congressional District. However, it is the degree of consideration, and not the mere fact of consideration, that is crucial.

To a certain extent, the clustering of Hispanics into two densely populated enclaves provided map makers with the luxury of resorting to traditional districting principles. It is not surprising to find that a comparatively small district with two densely packed minority enclaves is (excluding the connector) more compact and more respectful of political subdivisions than a larger district drawn to capture a more dispersed minority population.[48] District to district comparisons do not, therefore, necessarily inform the court of the role played by traditional districting principles in the configuration of the Fourth Congressional District. Rather, the inquiry must necessarily focus on the manner in which the boundaries are drawn to determine whether a rational pattern emerges to explain the district's configuration on grounds other than race (*e.g.*, do the intricately shaped boundaries follow or cross precinct borders? ward borders? natural or man-made barriers?, *etc.*). If race is considered with other factors of equal or greater weight, the configuration of the district should have some objectively verifiable explanations (*e.g.*, the border in part separates traditionally Democratic and Republican Party electoral strongholds). If an objectively determinable pattern does not emerge based on non-racial districting factors, the only plausible explanation of the district's configuration is race. Alternatively stated, the question is whether racial considerations substantially explain the configuration of the district's borders; if the answer is yes, racial considerations will have predominated.

In this case, a careful analysis of the Fourth District's boundaries

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46 The litigants substantially agreed prior to trial to the reconfiguration of the Second Congressional District, *id.* at 640, and apparently reached an agreement in principle on the reconfiguration of the First and Seventh Congressional Districts, save for the placement of Chicago's politically influential Second Ward.

47 The *Hastert* court acknowledged as much, stating:

> The location of the Chicago Hispanic community in two highly concentrated enclaves on either side of the Seventh Congressional District on Chicago's near northwest and near southwest sides necessarily requires an odd configuration to accommodate the creation of an Hispanic district and the three super-majority African-American districts dictated under the Voting Rights Act.

777 F. Supp. at 650.

establishes that they were drawn to maximize the percentage of Hispanics located within the district.[49] As King's witness Cleveland testified, the lines of the Fourth Congressional District follow the concentrations of the Hispanic population with "exquisite" detail. The district's boundaries were drawn at the census block level, which roughly corresponds to a city block.[50] While the map makers had to use census block data to ensure population equality, the census block data contained racial data at the city block level. This data permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics within the district. As a result, when a map of the Fourth Congressional District is superimposed over a map showing the concentration of the Hispanic population drawn at the census tract level, the district map "includes virtually all areas of high percent Hispanic concentration on the northern . . . part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago." (Def. Int. Exh. 12, at 105). The same is true when the exercise is repeated at the census block level based upon the percentage

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48 In the context of assessing the *Gingles* threshold requirements of a §2 Voting Rights Act claim, the *Hastert* court found that the "Chicago/Cook County Hispanic community is sufficiently large and geographically compact to constitute a single district majority." This finding does not establish, however, that the *Hastert* court also found that the district drawn to accommodate this community was compact. For example, a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic population within the City of Chicago. This rectangle serves as evidence of the Hispanic community's geographic compactness. The Fourth Congressional District, however, would not fit within the area of this same rectangle: neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle. The finding of geographic compactness to satisfy a *Gingles* threshold factor thus does not correspond to a separate finding that the Fourth Congressional District was also compact.

The *Hastert* court did not make any findings concerning the compactness of the Fourth Congressional District. Under the default rule previously articulated, this court must conclude that compactness was not considered in the configuration of the Fourth Congressional District. In any event, this court finds that the Fourth Congressional District is not visually compact. *See Schrage v. State Bd. of Elections*, 88 Ill. 2d 87, 98, 430 N.E.2d 483, 487 (1981) (recognizing visual inspection as appropriate means for evaluating compactness); *Martin v. Soucie*, 109 Ill. App. 3d 731, 734-35, 441 N.E.2d 131, 133-34 (3d Dist. 1982). In addition, unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact either.

of Hispanic concentration, *see* (Def. Int. Exh. 4, Map 1), and when Latino plurality block groups are considered.[51] (*Id.*, Map 2).

This close correlation is not surprising given the racial demographics of the city discussed earlier. Indeed, the *Hastert* court expressly found that racial considerations dictated the configuration of the two appendages jutting out of the district's two core areas. The court stated in this regard:

> To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Hastert, 777 F. Supp. at 648 n.24 (emphasis added). Portions of the western connector are also explainable only on racial grounds. For example, the portion of the Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion

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49 As adopted in 1991, the Fourth Congressional District has a total population of 571,530; of this amount, Hispanics account for sixty-five (65%) of the total population and fifty-nine (59%) of the voting age population. Over ninety-five percent (95%) of the district's population lives within the two core areas of the district located on the near northwest and near southwest sides of the city. The remaining 4.7% of the district's population lives within the narrow, C-shaped "western" connector that runs around the northern, western and southern borders of the Seventh Congressional District. Central Avenue in the City of Chicago serves as the dividing line between the western connector and the two core areas. The western connector, which contains a significant amount of vacant land, park land, cemeteries and industrial areas, connects the district's northern and southern core areas and thereby serves as a land bridge to ensure the district's contiguity. This contiguity, however, is "hypertechnical[] and . . . cynical[]," *see Hays v. State of Louisiana*, 839 F. Supp. 1188, 1200 (W.D. La. 1993), since it is preserved through the use of non-populated parks and barren industrial areas.

50 The 1990 Bureau of Census computer tapes divide census data into different units of aggregation. The most elementary level is the census block, which lists the population, voting age population and racial make-up of each city block. The next level of data aggregation is the census group block, which provides socio-economic data for larger groups composed of multiple census blocks. The district's boundaries do not conform to but rather split at least 150 census group blocks. For this reason, the district cannot have been drawn at the census group block level.

of the township included in the Third Congressional District is 4.9% Hispanic and 79.3% white.

The evidence also establishes that the boundaries of the Fourth Congressional District split a number of political subdivisions, including: eight (8) townships -- six (6) of which have population in the district; eighteen (18) municipalities -- sixteen (16) of which had population in the district; twenty (20) aldermanic wards; and two-hundred eighteen (218) precincts.[52] With the exception of precincts, other Illinois congressional districts split a comparable or greater number of subdivisions compared to the Fourth District: the Third, Sixth and Eleventh Districts split a similar number of townships (9, 8 and 7, respectively); the Second, Third, Sixth, Eighth, Eleventh and Thirteenth Districts all split more municipalities; and the First and Seventh Districts split a comparable number of aldermanic wards (19 and 15, respectively). This data, however, is of extremely limited usefulness because there is no meaningful standard against which it is to be measured. The data permits the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions. But this conclusion does not mean that respect for political subdivisions was not subordinated to racial considerations within the context of the Fourth Congressional District's boundaries. The data submitted does not inform the court one way or the other on this inquiry, and is therefore disregarded.[53]

The defendant-intervenors also argue that the district's configuration may be explained by socio-economic factors. To that end, Dr. David Garth Taylor testified at trial that the city's Caucasian, Hispanic and African-American populations have substantially different socio-economic status when home ownership, income, labor force

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51 The former measure examines the percentage of Hispanics in any given census block (*e.g.*, 40% of the block's population is Hispanic) while the latter measure examines the racial composition of the entire census block. An Hispanic plurality census block exists when the largest population group among all the racial groups living within that block is Hispanic.

52 These numbers were based upon the wards and precincts that existed at the time of the *Hastert* litigation. In 1992, the wards and precincts were realigned. Although Mr. Cleveland did not determine the number of wards split by the Fourth Congressional District after the realignment, he did disclose that the Fourth Congressional District split only sixty-one (61) of the realigned 1992 precincts. Mr. Cleveland's analysis properly focused, however, on the ward and precincts

participation, education and poverty levels are considered. Since the Fourth Congressional District is sixty-five percent (65%) Hispanic, it is not surprising that superimposing the socio-economic data onto maps of the city's congressional districts reveals that the electorate of the Fourth District have more socio-economic characteristics in common than the electorate of adjacent congressional districts. This observation notwithstanding, the socio-economic data does not explain the district's configuration. First, the socio-economic data was only available at the census group block level while the district was drawn at the smaller census block level. The defendant-intervenors have thus not shown that the socio-economic factors analyzed by Dr. Taylor were available or used at the time of the district's configuration.[54] Second, the *Hastert* court did not make any findings of fact concerning what role, if any, socio-economic factors played in the drawing of the district's boundaries. Hence, at best, the socio-economic model can only retrospectively explain the district's configuration but cannot demonstrate that the socio-economic data actually played a role in the configuration of the district's boundaries. Thus, while the socio-economic data establishes that the Hispanic community faces common issues, it fails to demonstrate that racial considerations did not predominate in the drawing of the district's actual boundaries. *See also Vera v. Richards*, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995) (same result); *Hays v. State of La.*, 839 F. Supp. 1188, 1203 (W.D. La. 1993) (same).[55]

Accordingly, this court concludes that racial considerations predominated in the configuration of the Fourth Congressional District, which was adopted but not drawn by the *Hastert* court.

IV. Strict Scrutiny

Having concluded that racial considerations predominated, this court must now subject the Fourth Congressional District to strict scrutiny; the district will only pass constitutional muster if it is narrowly tailored

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that existed at the time of the *Hastert* proceedings, since these were the only boundaries the map makers could have considered. In addition, it would be improper to consider the effect of the 1992 realignment, since it would be impossible to isolate what effect, if any, the Fourth Congressional District's boundaries adopted in 1991 had on the map makers who redrew the wards and precincts in 1992.

53 The *Hastert* court did not make any findings on this issue.

to serve a compelling state interest. Submitting a redistricting plan to strict scrutiny does not automatically toll the bells. The Supreme Court in *Adarand Constructors, Inc. v. Pena* most recently sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" ___ U.S. ___, 115 S. Ct. 2097, 2117 (1995) (citation omitted).

The defendant-intervenors contend that the *Hastert* court found and articulated a compelling government interest justifying the racially based configuration of the Fourth Congressional District; namely, remedying a potential violation of Section 2 of the Voting Rights Act. King raises two arguments in response: first, the *Hastert* court erred in finding that Section 2 of the Voting Rights Act required the creation of an Hispanic majority district; and second, remedying a Section 2 violation is not a compelling government interest. Since the Supreme Court has not yet decided the latter proposition, prudence dictates that this court should address and resolve King's first argument before considering what is really the threshold argument for this strict scrutiny analysis.

A. Whether the *Hastert* Court's Section 2 Finding Was Clear Error

The passage of time since the *Hastert* decision was announced in 1991 has provided this court with a unique vantage point from which to assess the validity of King's allegations of error. More specifically, two congressional elections have been held since 1991; in both elections, an Hispanic candidate was elected to Congress from the Fourth Congressional District. These electoral results minimize in many respects the force of King's arguments that the *Hastert* court erred in finding that the three *Gingles* prerequisites were satisfied. The Supreme Court in *Growe v. Emison* recently reiterated the reasons for the *Gingles* threshold requirements:

> The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its

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54 According to Cleveland, King's expert, this data was not published by the Census Bureau until May 15, 1992, almost six months after the *Hastert* court issued its decision. Whether this information was available to the *Hastert* litigants is not known.

55 *Vacated Louisiana v. Hays*, ___ U.S. ___, 114 S. Ct. 2731 (1994), *on remand*, *Hays v. State of La.*, 862 F. Supp. 119 (W.D. La. 1994), *vacated United States v. Hays*, ___ U.S. ___, 115 S. Ct. 2431 (1995), *on remand Hays v. State of La.*, No. 92-1241, slip op. (W.D. La. Jan 5, 1996).

> own choice in some single member district, *see Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2765 n.17. And the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population, *see Gingles*, *supra*, at 51, 106 S. Ct. at 2766.

507 U.S. 25, 113 S. Ct. 1075, 1084 (1992). The *Hastert* court's conclusions about the potential of the Hispanic electorate to elect a representative of its own choice have proved prescient in light of the 1992 and 1994 congressional election results. These same electoral successes, however, are fundamentally at odds with the purpose of the majority bloc voting prerequisite. While non-Hispanic racial bloc voting patterns did not thwart the election of the Hispanic's candidate of choice in the 1992 and 1994 congressional elections, discounting the effect of racially polarized voting based upon these two election results would be premature. The *Hastert* court found racial bloc voting at the federal, state and local levels; the framework for assessing the third *Gingles* prerequisite is thus broader than congressional elections. As the Supreme Court has recognized, "[t]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson v. DeGrandy*, ___ U.S. ___, 114 S. Ct. 2647, 2654 (1994) (*quoting Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149, 1157 (1993)). The *Gingles* prerequisites must nevertheless be clearly established. To that end, the Supreme Court has admonished that racial bloc voting and minority group political cohesion can never be assumed but must be specifically proven in each case.[56] *Growe*, 507 U.S. at ___, 113 S. Ct. at 1085.

King first argues that the *Hastert* court erred in finding that the Hispanic community was sufficiently numerous to constitute a majority in a properly drawn district. The genesis of this alleged error was the *Hastert* court's failure to determine the proper *eligible* minority voting population, which King defines as Hispanic citizens of voting age. *See Campos v. City of Houston*, 894 F. Supp. 1062, 1065 (S.D. Tx. 1995) (data on voting age Hispanic citizens is the proper measure of an Hispanic population's ability to create a majority voting district); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989) (affirming district court's conclusion that none of the proposed districts had a majority Hispanic population once citizenship and voting age

were considered); *see also Vera v. Richards*, 861 F. Supp. 1304, 1340 n.49 (S.D. Tx. 1994) (while noting that Section 2 vote dilution claims "are ordinarily premised on measures of citizen voting age population," the court assumed for equal protection purposes that "Hispanics are Hispanics, whether citizens or not"), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995).

Other courts have agreed in principle that only eligible minority voters should be considered in determining numerosity; however, these courts have defined eligible minority population to mean minority voting age population. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied* 490 U.S. 1031, 109 S.Ct. 1769 (1989); *Ketchum v. Byrne*, 740 F.2d 1398, 1412 (7th Cir. 1984); *League of United Latin Am. Citizens v. North East Indep. School Dist.*, 903 F. Supp. 1071, 1084 (W.D. Tx. 1995) (noting that with the exception of *Campos*, the district courts in the Fifth Circuit consider voting age population in evaluating the first *Gingles* prerequisite). The Seventh Circuit in *McNeil* explained the reason for the voting age population limitation as follows:

> Read literally, the *Gingles* population requirement could be construed to require that the minority group constitute a majority only of the total population in a proposed single-member district. Substantial evidence and common sense, however, dispute this construction. . . . The threshold requirement roughly measures minority voters' potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the Court intended the majority requirement to mean a voting age majority. Viewed another way, those ineligible to vote have not experienced a dilution of their vote. They are not parties to a Section 2 claim.

851 F.2d at 945. The Seventh Circuit has not yet addressed whether citizenship should also be considered a component of voter eligibility

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56 The district court must make specific findings to support each *Gingles* prerequisite. *See Statewide Reapportionment Advisory Comm. v. Theodore*, ___ U.S. ___, 113 S.Ct. 2954 (1993) (where the Court adopted the position advanced by the Solicitor General that the three judge panel had given inadequate consideration to and made inadequate findings concerning §2 of the Voting Rights Act and remanded the case for further development of the record in accordance with the points raised in the Solicitor General's *amicus* brief).

for the *Gingles* population requirement.[57] The Supreme Court has also not decided this issue. *See DeGrandy*, ___ U.S. at ___, 114 S. Ct. at 2655-56; *Growe*, 507 U.S. at ___ n.4, 113 S. Ct. at 1083 n.4.

This court too declines to resolve this question since King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent.[58] Hence, regardless of which measure this court uses -- total population, voting age population, or citizen voting age population -- the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion.

King next contends that the *Hastert* court erred in finding that the Hispanic community was politically cohesive. The premise of his argument is that the Puerto Rican and Mexican-American communities, which together account for the overwhelming majority of Chicago's Hispanic community, have different cultural, social, political and economic concerns that serve to separate rather than unify the Latino community. King further contends that these differences have manifested themselves in ethnically polarized bloc voting. Mexican-Americans predominately vote for Mexican-American candidates while Puerto-Ricans predominately vote for Puerto Rican candidates. The lay opinion elicited by King at trial to demonstrate and substantiate the claimed lack of cohesion was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw. King has thus failed to establish that the *Hastert* court's finding of political cohesiveness

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57 The Seventh Circuit in *Ketchum* flirted with the idea of considering citizenship as a measurement of population, *see* 740 F.2d at 1415 (advising district court that it could consider whether the Hispanic wards on the Southwest Side should have their majorities calculated on the basis of "only those individuals who are eligible, as citizens, to vote"), but it did so because "there should be an appropriate corrective for non-citizenship." *Id.* at 1415 n.19.

58 The 1990 census data reported that 194,438 of the 345,307 Hispanic residents in the City of Chicago were United States citizens, or 56.30%. This data, however, was not available at the time of the *Hastert* decision.

The census report notwithstanding, King's witness Cleveland, testified at trial that only forty-five percent (45%) of the Fourth Congressional District's Hispanic population were citizens. There are simply too many uncertainties surrounding the validity of the data used by King to warrant such a conclusion. First, the 1990 census data was reported at the census block group level rather than the census

was clearly erroneous. He has likewise failed to establish that the circumstances have changed in any quantifiably significant measure since 1991.[59]

King also argues that changed circumstances since 1991 have lessened white racial bloc voting, such that "it is now a rare case that an Hispanic candidate of choice is defeated as a result of racial bloc voting." Neither proposition advanced by King is supported by recent city-wide election results or meaningful statistical analysis. Since 1988, only three Hispanic candidates have been elected in citywide elections. Two Hispanic judges were elected in 1988 and 1990; however, both candidates won with less than a majority of the vote due to a splintering of votes among multiple white candidates. In addition, Miriam Santos, an Hispanic, was elected as city treasurer in 1991; however, Ms. Santos had been slated for this position by the Chicago Democratic Party and she ran on a slate that included incumbent mayor Richard Daley. Ms. Santos subsequently ran as an incumbent in 1995 and was reelected. With the exception of Ms. Santos, the Democratic Party has not slated an Hispanic candidate for alderman, state senate, state representative, or congress in any district with a white majority voting age population.

King's proposition is also statistically invalid. The results of Dr. Allan J. Lichtman's ecological regression analysis and extreme case performance of forty-one elections held between 1983 and 1995 establish a definite and continuing pattern of white racial-bloc voting

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block level. The Fourth District's boundaries were drawn, however, at the smaller census block level and split at least 150 census group blocks. Second, the census reported citizenship data was based on sample data rather than on 100% enumeration, the basis upon which total population and voting age population are reported. Third, Cleveland admitted that the census data provided only a snapshot view of citizenship levels in 1990, and thus did not take into account changes in citizenship levels since 1990 due to naturalization and the amnesty program of the Immigration and Naturalization Control Act of 1986. Indeed, Dr. Taylor testified on behalf of the defendant-intervenors that a large number of persons granted amnesty under that Act resided in zip code areas located within the northern and southern areas of the Fourth District. Cleveland's calculations did not compensate for amnesty programs, and likewise did not account for either an overreporting or underreporting of citizenship data. Based on these flaws, this court declines to find that the Hispanic citizenship rate in the Fourth Congressional District was approximately forty-five percent (45%) either in 1990 or today.

59 To the contrary, the factual record is replete with testimony establishing the political and social cohesiveness of the Hispanic community. State Senators Jesus

against Hispanic candidates.[60] Dr. Lichtman's analysis reveals that "since 1987, Hispanics have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority." Based upon these results, Dr. Lichtman concludes that "Hispanics in the City of Chicago would have a reasonable opportunity to elect a candidate of their choice to Congress only in a district with a voting-age majority of Hispanics."

While Ms. Santos's electoral success raises hopes for a color-blind slating and election processes in the future, the problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain. The *Hastert* court thus properly found that the third *Gingles* factor was satisfied in 1991, and King has not established any present day change in circumstances that would warrant a contrary finding.

King finally argues that the Fourth Congressional District was not sufficiently compact to create a separate Hispanic District. To demonstrate this point, King argues that the 743-sided district is neither visually nor mathematically compact. Once again, King has confused the *Gingles* threshold requirement of geographical compactness with the principle of compactness used to assess whether racial gerrymandering has occurred. *See supra* footnote 48. The question raised by *Gingles* is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. This measure of geographical compactness thus concerns whether a Section 2 violation has occurred; the second measure of compactness (*i.e.*, as a traditional race-neutral districting principle) concerns whether the district drawn to remedy the Section 2 violation satisfies the requirements of the Equal Protection Clause. To conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of *Shaw*. *But see Reed v. Town of Babylon*, ___ F. Supp. ___, 1996 WL 28966, at *26 (E.D.N.Y. 1996) (where the court applied the

60 Dr. Lichtman studied precinct-by-precinct election returns for 41 partisan and non-partisan (*i.e.*, City Council) elections involving Hispanic and non-Hispanic candidates in the City of Chicago from 1983 to the present in which the losing candidate, whether Hispanic or not, received at least fifteen percent of the vote. In addition, Dr. Lichtman supplemented his ecological regression and extreme case analysis by examining the squared correlation coefficients. This value is used to assess the strength of association between two variables.

principles established in *Shaw* to the first *Gingles* prerequisite, and concluded that "the plaintiffs must, in order to meet their burden of proof under the first *Gingles* precondition, either "proffer a districting plan which does not subordinate racial considerations to traditional districting principles, including compactness . . . , or justify the need for such subordination") (citations omitted). This court accordingly concludes that the *Hastert* court's finding of geographic compactness was appropriate.

Since King has limited his challenges to the Hastert court's findings concerning the existence of the three Gingles prerequisites, this court will not undertake to review or supplement the prior court's findings with respect to the totality of circumstances test.[61] The *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act.

B. Whether Remedying a Section 2 Violation is a Compelling State Interest

Section 2 of the Voting Rights Act prohibits "any practice or procedure that, 'interacting with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149, 1155 (1993) (*quoting Gingles*, 478 U.S. at 47, 106 S. Ct. at 2764); *accord DeGrandy*, ___ U.S. at ___, 114 S. Ct. at 2655. Because the purpose of Section 2 is "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race [or] color . . . ", *Voinovich*, 507 U.S. at ___, 113 S. Ct. at 1154-55 (*quoting* U.S. Const., Amdt. 15), state actors have frequently argued that a racially based redistricting remedy under Section 2 serves a compelling government interest. *See, e.g., Quilter v. Voinovich*, ___ F. Supp. ___, 1995 WL 783342 (N.D. Oh.), *appeal dismissed* ___ U.S. ___, 116 S.Ct. 42 (1995); *Shaw*, 861 F. Supp. at 437; *Hays v. State of La.*, 839 F. Supp. 1188, 1217 (W.D. La. 1993) (Walter, J., concurring). The Supreme Court, however, has not yet decided whether "compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination . . . ." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2491.

61 The three *Gingles* factors are necessary prerequisites but are not collectively sufficient to establish a §2 violation. *DeGrandy*, ___ U.S. at ___, 114 S. Ct. at 2657, 2658 & n. 10 (*citing Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 2334 (1993)).

The Supreme Court has nonetheless recognized a distinction "between what the [Voting Rights Act] permits, and what it requires." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830. Based upon this distinction, the Supreme Court has concluded that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller*, ___ U.S. at ___, 115 S. Ct. at 2491 (*citing Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830-31). This rule is based upon the fundamental precept that "the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Voinovich*, 507 U.S. at ___, 113 S. Ct. at 1156 (*citing Growe*, 507 U.S. at __, 113 S. Ct. at 1084).

Where a violation of the Voting Rights Act has been established, a race based remedy may be appropriate. In *Shaw*, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a "strong basis in evidence for concluding that remedial action [is] necessary." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2831-32 (citations omitted); *see also Miller*, ___ U.S. at ___, 115 S. Ct. at 2475 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."). This compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life. *See Quilter*, ___ F. Supp. at ___, 1995 WL 783342, at *9 (*citing Croson*, 488 U.S. at 500, 109 S. Ct. at 725; *Wygant*, 476 U.S. at 274-75, 106 S. Ct. at 1846-47); *accord Shaw*, 861 F. Supp. at 437.

In this case, the *Hastert* court had a strong basis both for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the *Hastert* court cited with approval prior judicial determinations that found a definite pattern and practice of electoral discrimination against the Hispanic community in the City of Chicago and the State of Illinois.[62] The *Hastert* court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of elected Hispanic officials at the city and state-levels

and more subtly in the social and economic discrimination that adversely affected effective political participation and representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past electoral discrimination against Hispanics.[62] However, the redistricting plan adopted by the *Hastert* court has served more than a remedial role: hindsight reveals that it has protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate. Accordingly, this court concludes that the remedy adopted by the *Hastert* court to redress an established Section 2 violation served, and continues to serve, compelling state interests.

In reaching this conclusion, the court drew an important distinction between using a race-based remedy to redress demonstrable injuries from specific, discriminatory electoral practices as opposed to redressing the effects of more generalized discrimination. In *Miller*, for example, the Supreme Court concluded that Georgia's Eleventh Congressional District was not required by the Voting Rights Act but instead was created in response to the Department of Justice's tactical withholding of Section 5 preclearance approval. The DOJ's "black-maximization" policy that forced the Georgia legislature into creating the majority-minority Eleventh Congressional District was not based on any demonstrated minority vote dilution under Section 2 or retrogression under section 5; as such, the Eleventh Congressional District was not created in response to a particularized, proven injury. Instead, the DOJ's "black-maximization" policy may only be viewed as an effort to redress the generalized effects of prior discriminatory practices. In contrast, the *Hastert* court adopted the Fourth Congressional District to remedy a proven Section 2 violation. The injuries resulting from the dilution of the Hispanic voting power were

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62 As previously observed in footnote 21 *supra*, aligning the *Hastert* parties along partisan political lines resembled a partisan division highly reminiscent of the state legislature. The parties' bipartisan agreement that an Hispanic majority district needed to be created under §2 was thus an important acknowledgement, tantamount to an "official" concession, that the then existing electoral practices and procedures, combined with historical and social conditions, caused a dilution of Hispanic voting power in violation of §2. The parties' bipartisan agreement as to the nature and configuration of the Hispanic majority district was an equally important acknowledgement/tacit concession that remedying the discriminatory effects of that vote dilution served a compelling interest.

clear and present. The nature and extent of the Voting Rights Act violation are thus important factors in the calculus of considerations analyzed to determine whether a race-based remedy serves a compelling state interest.

C. The Court-Ordered Redistricting Plan is Narrowly Tailored

The final prong of the strict scrutiny analysis requires this court to determine whether the Fourth Congressional District as adopted by the *Hastert* court is narrowly tailored. The focus of this inquiry is whether the means chosen to accomplish the compelling state interest are specifically and narrowly framed to accomplish that purpose. *See Wygant*, 476 U.S. at 280, 106 S. Ct. at 1850. Alternatively stated, the question is whether in configuring the Fourth Congressional District, race was taken into account to a greater degree than necessary to further a compelling state interest.[63] *Shaw*, 861 F. Supp. at 408.

The Supreme Court has not established any standards for evaluating whether a racially based redistricting plan is narrowly tailored, except to state that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2831. As a result, federal district courts have employed differing standards to determine whether a racially based redistricting plan is narrowly tailored. *Compare Shaw*, 861 F. Supp. at 444-56; *Quilter*, ___ F. Supp. at ___, 1995 WL 783342, at *10-12, *with Vera*, 861 F. Supp. at 1343 & n.44.

This court, however, does not need to take sides in this dispute. Its task is to determine whether a *court-ordered* reapportionment plan is narrowly tailored. As such, it must defer to *Hastert* court's discretion in selecting an appropriate remedy. *See United States v. Paradise*, 480 U.S. 149, 183-85, 107 S. Ct. 1053, 1073-74 (1987). As the Supreme Court explained,

> In determining whether this order was 'narrowly tailored,' we must acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future . . . .

Id. at 183, 107 S. Ct. at 1073 (citation omitted). The Court further

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63 "Racial classifications are simply too pernicious to permit any but the most

acknowledged that it has not required in all situations that remedial plans "be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Id.* (citations omitted).

There is no evidence that the *Hastert* court abused its discretion. Prior to adopting a remedial plan, the court subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation. In addition, the remedial plan it adopted was properly proportioned to the nature of the violation. That is, the court adopted a single majority-minority district which was limited in size to the minimum number of Hispanic residents generally believed necessary to counteract the effects of racial bloc voting and ensure that the Hispanic electorate had a reasonable opportunity to elect a candidate of its choice. It further determined that the district's extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression. Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan. Where the drawing even of irregular lines is required to remedy established violations of the Voting Rights Act, the court need not flinch from its obligation to do so with a bold and deliberate pen. Accordingly, the Fourth Congressional District passes constitutional muster.[64]

WHEREFORE, for the foregoing reasons, this court concludes that the Fourth Congressional District is constitutional.

ENTER:

\s\ Michael S. Kanne
Michael S. Kanne
U.S. Circuit Judge

\s\ Charles R. Norgle, Sr.
Charles R. Norgle, Sr.

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exact connection between justification and classification." *Wygant*, 476 U.S. at 280, 106 S. Ct. at 1850 (*quoting Fullilove v. Klutznik*, 448 U.S. 448, 537, 100 S. Ct. 2758, 2805 (1980) (Stevens, J., dissenting)).

U.S. District Judge

\s\ David H. Coar
David H. Coar
U.S. District Judge

Dated: March 7, 1996

64 King's Motion for a Preliminary Injunction is therefore denied.

Outline of Opinion in
King v. State Board of Elections, et al.
Dated August 1, 1997

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II. The Usefulness of an Additional Evidentiary Hearing 73

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	Hon. Michael S. Kanne
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	Hon. Charles R. Norgle, Sr. Hon. David H. Coar Dated: August 1, 1997
	)	
Defendant Intervenors.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on remand from the Supreme Court for further consideration in light of *Shaw v. Hunt*, 517 U.S.—, 116 S.Ct. 1894 (1996) (hereinafter "*Shaw II* "), and *Bush v. Vera*, 517

U.S.—, 116 S.Ct. 1941 (1996) (hereinafter "*Bush* "). *King v. Illinois Bd. of Elections*,—U.S .—, 117 S.Ct. 429 (1996). Pursuant to 28 U.S.C. section 2284(a), the undersigned three-judge panel was appointed to preside over this litigation.

Upon remand, plaintiff filed a motion for an additional evidentiary hearing. This court denied the requested relief by order of April 4, 1997. Plaintiff has since moved this court to reconsider its ruling on that issue. Briefs have been filed both on the remand and on plaintiff's motion for an additional evidentiary hearing. Thus, this case is before the court on both issues. Having carefully examined *Shaw II* and *Bush* and the memoranda and arguments presented by the parties, this court finds both cases supportive of its analysis and accordingly affirms its previous decision in *King v. State Bd. of Elections*, No. 95-C827, 1996 WL 130439 (N.D.Ill. Mar.6, 1996) (hereinafter "*King I* "). Moreover, for the reasons stated in this memorandum opinion, plaintiff's motion to reconsider is denied.

It is important to note at the outset, however, that this opinion merely supplements the subject of the remand and its purpose is to determine what impact, if any, *Shaw II* and *Bush* have on this court's prior analyses. Hopefully, this opinion will provide a roadmap of *King I* that illustrates that *King I* is in accord with *Shaw II* and *Bush*. To this end, this opinion will discuss the relevant holdings of each of those opinions.

Discussion

Since this court issued its ruling in *King I*, the Supreme Court has further developed its constitutional jurisprudence with respect to voting rights in two pivotal decisions: *Shaw II* and *Bush*. These decisions of even date have markedly changed and elucidated the landscape of voting rights litigation and legislation. As a result, this court has undertaken a full review of the underlying record as well as the briefs filed upon this remand. The court has likewise carefully considered the evidence submitted upon the plaintiff's offer of proof in support of his motion to reopen the evidence.[FN1] Nothing in this restudy of

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1. Plaintiff proposed to present the court with the following:

(a) Names and addresses of voters who lost their ballot secrecy in specific precincts in Chicago and Cook County; for example, two voters residing in the 400 block of Noble St. in the 1st Ward, precinct 55 in the March 19, 1996 primary were the only two of 139 Democrats in the precinct who were placed in Congressional District 7 instead of Congressional District 4; currently Plaintiff has a total of thirty (30) such instances occurring in 1996, 1994 and 1992 General Congressional Elections and the 1992 Primary Congressional Election.

the record has revealed any error in the statement of facts set forth in *King I*. Rather, the court remains of the view that the facts, other than those to be inferred, are correctly set forth in its prior opinion.

Notwithstanding the accuracy of the factual record, certain comments upon the law are in order. Indeed, the necessity for or the propriety of reopening the record can better be judged following some analysis of both the legal and factual issues involved in this remand. Moreover, such analysis affirms this court's earlier conclusion that the Fourth Congressional District (hereinafter the "Fourth District") is constitutionally sound.

I. The Import of *Shaw II* and *Bush* to *King I*

Shaw II and *Bush* have a direct impact on this court's strict scrutiny analysis in *King I*. Although both *Shaw II* and *Bush* further develop the analysis that should apply to each aspect of voting rights litigation, (e.g., the Gingles test and the "predominance of race" test—especially, with respect to s 2 violations), none of these developments alters this court's determination that strict scrutiny applies. Rather, on remand, what is implicated by the two more recent decisions is this court's strict scrutiny analysis, and more specifically, the issue of whether the Fourth Congressional District is a narrowly tailored response to prior discrimination. In *King I*, this court set forth a strict scrutiny

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(b) Administrative confusion; for example, that occurring in Proviso precinct 132, in the western section of North Riverside, where voters on the 9000 block of Forest View Drive have been incorrectly assigned to Congressional District 4 for the last (3) election cycles.

(c) Fractured neighborhoods, including the testimony of Dr. John Pelissaro, an expert witness in the Barnett case, regarding the continued reliance by the City and other governmental bodies upon maps of the community areas and neighborhoods of the City of Chicago.

(d) Evidence of the split political subdivisions by Congressional plans in the 1980's and 1970's in contrast to the *Hastert* plan.

(e) While evidence was offered that Hispanic citizens do not comprise a majority of the present 4th Congressional District, Plaintiff is now prepared to offer further evidence of the Citizen Voting Age Population introduced to a sister court in the Barnett proceeding. This evidence would include the testimony of Congressman Gutierrez that he knew in 1991 that Latino voters were not a majority of the district.

(f) Evidence that African-Americans can elect their candidate of choice in far less racial districts than the present 7th Congressional District; this would include data of recent victories by African-American congressmen in districts with less than 50% VAP African-Americans. Pl. Motion at 3-4.

analysis which supported its conclusion that the Fourth District is constitutional. A review of that analysis in light of *Shaw II* and *Bush* reveals that no additional examination is required.

A. Compelling State Interest

In addition to finding that there is no dispute that race was a factor in the configuration of the Fourth District, this court concluded that "racial considerations predominated." *King I*, 1996 WL 130439 * 19, 22 [App. 40, 47]. Accordingly, this court applied strict scrutiny to the Fourth District to determine whether it passed constitutional muster under the Equal Protection Clause.

In order to survive strict scrutiny, the Fourth District must be proved narrowly tailored to serve a compelling state interest. The compelling state interest proffered by the *Hastert* court was remedying a potential violation of or achieving compliance with section 2 of the Voting Rights Act. *Id.* at * 22 [App. 47]. Recognizing that the Court has never expressly held that remedying a potential violation of or achieving compliance with section 2, standing alone, is a compelling state interest, this court advanced arguments based on earlier Supreme Court decisions on race-based remedies in support of its view that such an interest is compelling. Specifically, this court asserted that the Court's recognition of a distinction between "'what the [Voting Rights Act] permits and what it requires'" and its resulting conclusion that "'compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and applications of those laws'" demonstrate that race-based remedies may be appropriate. *King I*, 1996 WL 130439, at * 26 [App. 54-55] (quoting *Shaw v. Reno*, 509 U.S. 630, 653, 113 S.Ct. 2816, 2830, 125 L.Ed.2d 511 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S.Ct. 1149, 1156, 122 L.Ed.2d 500 (1993)). Moreover, noting the Court's acknowledgment of justifiable race-based remedies to cure the effects of past discrimination where there is a "strong basis in evidence" of the harm being remedied, this court reasoned that "[t]his compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life." *Id.* (citing *Quilter v. Voinovich*, 912 F.Supp. 1006, 1020 (N.D.Ohio 1995) (citations omitted); *Shaw v. Hunt*, 861 F.Supp. 408, 437 (E.D.N.C.1994)).

In *Bush*, Justice O'Connor (in concurrence) provided additional

support for these propositions. She asserted that compliance with section 2 of the Voting Rights Act and, in particular, the results test, is a compelling interest. In favor of that position she wrote:

> We should allow States to assume the constitutionality of section 2 of the Voting Rights Act, including the 1982 amendments.
>
> This conclusion is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments. See *Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 1562-1563, 64 L.Ed.2d 119 (1980). The results test of section 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. S.Rep. No. 97-417, p. 4 (1982), *U.S.Code Cong. & Admin. News* 1982, pp. 177, 181. Congress considered the test "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Id.*, at 27, *U.S.Code Cong. & Admin. News* 1982, p. 204. It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," *id.*, at 26, *U.S.Code Cong. & Admin. News* 1982, p. 204, or about "voting practices and procedures [that] perpetuate the effects of past purposeful discrimination," *id.*, at 40, *U.S.Code Cong. & Admin. News* 1982, p. 218. And it founded those beliefs on the sad reality that "there still are some communities in our Nation where racial politics do dominate the electoral process." *Id.*, at 33, U.S.Code Cong. & Admin. News 1982, p. 211. Respect for those legislative conclusions mandates that the s 2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional.
>
> In my view, therefore, *the States have a compelling interest in complying with the results test as this Court has interpreted it.*

Bush, 517 U.S. —, 116 S.Ct. at 1970 (O'Connor, J., concurring) (emphasis added). Similarly, in a lengthy dissent in which Justices Ginsburg and Breyer join, Justice Stevens refers to the Court's assumption that compliance with section 2 of the Voting Rights Act

is a compelling state interest as "perfectly obvious ." *Id.* at—, — U.S. at ——, 116 S.Ct. at 1989 (Stevens, J., dissenting). These comments support this court's conclusion that remedying a potential violation of or achieving compliance with section 2 is a compelling state interest. Indeed, in *King I* this court wrote:

> Because the purpose of Section 2 is "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged ... on account of race [or] color ...", ... state actors have frequently argued that a racially based redistricting remedy under Section 2 serves a compelling government interest.
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> * * *
>
> In *Shaw*, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a "strong basis in evidence for concluding that remedial action [is] necessary." .... This compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life.

King I, 1996 WL 130439, * 26 [App. 54-55] (citations omitted). The *King I* opinion then goes on to acknowledge the strong basis in evidence that the *Hastert* court had "both for finding a section 2 violation and for adopting a redistricting plan that remedied that violation." *Id.* at * 27 [App. 55]. Thus, in light of the statements of Justices O'Connor and Stevens and the absence of any contrary holding by a majority of the Court, this court affirms its prior analysis that remedying a potential violation of or achieving compliance with section 2 constitutes a compelling state interest.

B. Narrow Tailoring

The true significance of the Court's remand of *King I* becomes evident upon review of this court's discussion on the narrow tailoring of the Fourth District. In *Shaw II* and *Bush* the Supreme Court defines the parameters of narrow tailoring in an effort to guide lower courts in their evaluation of challenged legislative or judicial action in the voting rights context. Although this court did not perform analyses that expressly reflect the newly articulated narrow tailoring inquiry in *King I*, it drew all of the conclusions necessary to support its holding within that framework.

In *Bush*, Justice O'Connor noted that the narrow tailoring prong

permits "a limited degree of leeway" in drawing remedial districts, provided that (1) there exists a "strong basis in evidence" of the three Gingles prerequisites and (2) the race-based district "substantially addresses the section 2 violation." *Id.* at 1960-61. To be sure, *Bush* makes clear that the shape of the district is relevant to the narrow tailoring inquiry. *Id.* at 1962. However, *Bush* rejected as "impossibly stringent" the view that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Id.* Thus, "a section 2 district that is reasonably compact and regular, taking into account traditional redistricting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts [] in endless 'beauty contests'" if it does not "subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid s 2 liability." *Id.* at 1961.

Shaw II further defines this standard in holding that, in order to pass constitutional muster under the Equal Protection Clause, the majority-minority district "must, at a minimum, remedy the anticipated violation or achieve [section 2] compliance ...". *Id.* at 1905. Read together, *Shaw II* and *Bush* reveal the following precept for narrow tailoring inquiries under section 2: A section 2 district is narrowly-tailored if (1) at a minimum, the district remedies the anticipated violation or achieves section 2 compliance, and (2) its consideration of race is no more than reasonably necessary to fulfill its remedial purpose.

In concluding that the Fourth District was narrowly tailored, this court deferred to the *Hastert* court's discretion in adopting remedial plans and its "exacting constitutional review" in determining the best remedial measure. *King I*, 1996 WL 130439, at * 28 [App. 58]. In addition, this court found that the Fourth District "was properly proportioned to the nature of the violation." *Id.* Specifically, this court stated,

> [T]he [*Hastert*] court adopted a single majority-minority district which was limited in size to the minimum number of Hispanic residents generally believed necessary to counteract the effects of racial bloc voting and ensure that the Hispanic electorate had a reasonable opportunity to elect a candidate of its choice. It further determined that the district's extraordinary configuration was required to

> preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression. Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan.

Id.

In order to support this conclusion in the wake of *Shaw II* and *Bush*, the record must demonstrate that (1) there was a "strong basis in evidence" for finding the threshold conditions for s 2 liability; (2) at a minimum, the Fourth District remedies the anticipated violation or achieves section 2 compliance; and (3) the district's consideration of race is no more than reasonably necessary to fulfill its remedial purpose. Having determined that there was a "strong basis in evidence" for finding the threshold conditions for s 2 liability, [FN2] this court must show that the Fourth District achieves compliance with section 2 or remedies the anticipated violation thereof and does "not subordinate traditional districting principles to race substantially more than 'reasonably necessary.'"

A district cannot be held to remedy a potential section 2 violation if the minority group contained therein is not (1) "geographically compact;" (2) "politically cohesive;" and (3) potentially barred by majority bloc voting from electing its preferred candidate, absent the existence of the district. See *Bush*, 517 U.S.—, 116 S.Ct. at 1961; *Shaw II*, 517 U.S.—, 116 S.Ct. at 1906. Thus, as part of its narrow tailoring inquiry, this court must rely on its earlier findings that the Fourth District meets these three requirements. These findings are contained in this court's discussion of the *Hastert* Court's section 2 analysis, which this court adopted later in its opinion: [FN3]

> The [*Hastert*] court made the following findings of fact to support its conclusion that the Chicago/Cook County Hispanic community was "sufficiently large and geographically compact to constitute a single district majority." First, the 1990 census reported the Hispanic population in Chicago at 545,852, a 29.33% increase over the 1980 total. Second, "[m]ost of the Chicago/Cook County

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2. See *King I*, 1996 WL 130439, at * 27 [App. 55-56].

3. *Id.* at * 26 [App. 54] ("The *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act.").

> Hispanic population is clustered in two dense enclaves, one on Chicago's near northwest side and one on the near southwest side." Third, the two enclaves are less than one mile apart at their closest point. Fourth, this separation resulted from exogenous physical and institutional barriers—specifically, the east-west Eisenhower Expressway, the University of Illinois-Chicago Circle campus, and various major medical institutions—and thus did not indicate the existence of two distinct communities.
>
> To support its conclusion that the Chicago/Cook County Hispanic community was politically cohesive, the court adopted the findings of cohesiveness made by two federal courts in the early 1980s in cases where the Hispanic community challenged discriminatory redistricting practices at the state and local levels. The court further found that the voting bloc patterns of the Hispanic community also demonstrated its political cohesiveness. More specifically, the court found that "[s]ingle and bivariate regression analysis of voting patterns in Chicago precincts demonstrate significant ethnic bloc voting patterns." Finally, the court found that the third threshold factor was fulfilled because the paucity of Hispanic officials in city and state-wide elected political offices compelled "the finding that ethnic bloc voting patterns have thwarted the political interests of the Hispanic community."

Id. at * 9 [App. 23-24] (citations omitted). In addition to these three factors, the *Hastert* court considered the "totality of the circumstances" test, also required under *Gingles*, to determine whether the Fourth District was warranted under section 2.

> However, rather than making its own findings of fact with respect to these factors, the [*Hastert*] court adopted the Seventh Circuit's findings concerning the Chicago Hispanic community set forth in *Ketchum v. Byrne*, the Section 2 Voting Rights Act challenge of the 1982 Chicago aldermanic redistricting plan. Based on a "judicially recognized history of discrimination, both past and present, against the Chicago Hispanic community and its attendant impact on effective political participation and representation," the *Hastert* court concluded that an Hispanic majority district was warranted

under *Gingles*.

Id. at * 9-10 [App. 24] (citations omitted).

These conclusions, in addition to those contained in this court's refutation of several arguments advanced by plaintiff in an effort to challenge the *Hastert* court's findings, are sufficient to establish that the Fourth District is narrowly tailored even in light of *Bush* and *Shaw II*. For example, this court rejected King's argument that the *Hastert* court erred in finding that the Hispanic community was sufficiently numerous by failing to determine the proper eligible minority voting population, that is, the total population Hispanic citizens of voting age. This court declined to resolve whether the *Hastert* court had an obligation to identify this population before making its finding of numerosity since King did not "establish[] via competent evidence that the Hispanic citizen voting age population falls below fifty percent." *Id.* at * 24 [App. 51]. The court further concluded that "regardless of which measure this court uses—total population, voting age population, or citizen voting age population—the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion." *Id.* at * 24 [App. 51].

In addition, this court addressed the argument that the Puerto Rican and Mexican-American communities were not politically cohesive because of their allegedly "different cultural, social, political, and economic concerns that serve to separate rather than unify the Latino community." *Id.* Finding that the "lay opinion elicited by King at trial to demonstrate and substantiate the claimed lack of cohesion was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw [,]" this court concluded that the *Hastert* court's finding of political cohesiveness was not clearly erroneous. *Id.*

Moreover, this court also resolved that, since 1991 there was no change in circumstances to support a finding that white racial bloc voting had decreased. *Id.* at * 25 [App. 52]. Rather, this court found that,

> [s]ince 1988, only three Hispanic candidates have been elected in citywide elections. Two Hispanic judges were elected in 1988 and 1990; however, both candidates won with less than a majority of the vote due to a splintering of

votes among multiple white candidates. In addition, Miriam Santos, an Hispanic, was elected as city treasurer in 1991; however, Ms. Santos had been slated for this position by the Chicago Democratic Party and she ran on a slate that included incumbent mayor Richard Daley. Ms. Santos subsequently ran as an incumbent in 1995 and was reelected. With the exception of Ms. Santos, the Democratic Party has not slated an Hispanic candidate for alderman, state senate, state representative, or congress in any district with a white majority voting age population.

Id. This court also acknowledged that,

> [w]hile Ms. Santos's electoral success raises hopes for a color-blind slating and election processes [sic] in the future, the problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain. The *Hastert* court thus properly found that the third Gingles factor was satisfied in 1991, and King has not established any present day change in circumstances that would warrant a contrary finding.

Id.

In its discussion of whether race predominated in the *Hastert* court's configuration of the Fourth District, this court also rejected the argument that its bizarre shape belies compactness. The following is a passage from that discussion:

> To a certain extent, the clustering of Hispanics into two densely populated enclaves provided map makers with the luxury of resorting to traditional districting principles. It is not surprising to find that a comparatively small district with two densely packed minority enclaves is (excluding the connector)[[FN4]] more compact and more respectful of political subdivisions than a larger district drawn to capture a more dispersed minority population.
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> * * *

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4. The evidence at trial demonstrated that only 4.7% of the population of the Fourth District was contained in the connector. *Id.* at * 29 & n. 49. Thus, all but a small fraction of the population resides within the compact areas which clearly satisfy the Gingles criteria. By contrast, only 20% of the districts challenged in *Shaw II* coincided with the area where the targeted minority group was allegedly geographically concentrated. *Shaw II*, at—, — U.S. at ——, 116 S.Ct. at 1907. Thus 80% of the district did not contain a compact minority population. *Id.*

In this case, a careful analysis of the Fourth District's boundaries establishes that they were drawn to maximize the percentage of Hispanics located within the district. As King's witness Cleveland testified, the lines of the Fourth Congressional District follow the concentrations of the Hispanic population with "exquisite" detail. The district's boundaries were drawn at the census block level, which roughly corresponds to a city block. While the map makers had to use census block data to ensure population equality, the census block data contained racial data at the city block level. This data permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics within the district. As a result, when a map of the is superimposed over a map showing the concentration of the Hispanic population drawn at the census tract level, the district map "includes virtually all areas of high percent Hispanic concentration on the northern ... part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago." The same is true when the exercise is repeated at the census block level based upon the percentage of Hispanic concentration, and when Latino plurality block groups are considered. This close correlation is not surprising given the racial demographics of the city discussed earlier.

* * *

Moreover, the western connector serves to preserve the shared interests of Latino voters and protect the three African American majority districts from retrogression. In the absence of evidence that those districts are unconstitutionally drawn, the preservation of existing districts was a valid secondary consideration. *See Good v. Austin*, 800 F.Supp. 551, 554 (E. & W.D.Mich.1992) (emphasis added) ("Federal courts have recognized the following as relevant secondary criteria: compactness, contiguity, preservation of the integrity of county and municipal boundaries, *maintenance of the cores of existing districts*, preservation of cultural, social, and economic communities of interest and political and racial fairness."); *see also White v. Weiser*, 412 U.S. 783, 793-97, 93 S.Ct. 2348-56, 37 L.Ed.2d 335 (1973) (establishing incumbency protection as a legitimate districting principle). Thus, the western connector, while it contributes to the district's physical inelegance, does not compel a finding that traditional districting factors were subordinate to race more than reasonably necessary in the configuration of the Fourth District.

> The evidence also establishes that the boundaries of the Fourth Congressional District split a number of political subdivisions, including: eight (8) townships—six (6) of which have population in the district; eighteen (18) municipalities—sixteen (16) of which had population in the district; twenty (20) aldermanic wards; and two-hundred eighteen (218) precincts. With the exception of precincts, other Illinois congressional districts split a comparable or greater number of subdivisions compared to the Fourth District: the Third, Sixth and Eleventh Districts split a similar number of townships (9, 8 and 7, respectively); the Second, Third, Sixth, Eighth, Eleventh and Thirteenth Districts all split more municipalities; and the First and Seventh Districts split a comparable number of aldermanic wards (19 and 15, respectively). [FN5]

Id. at * 20-21 [App. 42-46] (footnotes and citations omitted).

Finally, the *King I* opinion presented evidence that the Fourth District, in fact, remedied the anticipated section 2 violation by preserving the Latino community's voting strength through vote consolidation. In this light, this court wrote:

> [T]he redistricting plan adopted by the *Hastert* court has served more than a remedial role: hindsight reveals that it has protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate. Accordingly, this court concludes that the remedy adopted by the *Hastert* court to redress an established Section 2 violation served, and continues to serve, compelling state interests.

Id. at * 27 [App. 56].

In light of the foregoing, this court concludes that, under both *Shaw II* and *Bush*, the Fourth District remedies the anticipated violation and achieves section 2 compliance, and that its consideration of race

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5. Although this court resolved that this evidence, when applying the "predominance of race" test, "is of extremely limited usefulness because there is no meaningful standard against which it is to be measured[,]" it also held that the data permit "the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions." *Id.* While uncertain, this conclusion offers support that the Fourth District is "reasonably compact" when viewed in comparison to other Illinois congressional districts and therefore should not be disregarded.

(reflected by its noncompactness and irregularity) is no more than reasonably necessary to fulfill its remedial purpose. Accordingly, the ruling in *King I* need not be amended or altered in view of either case. [FN6] Rather, these decisions affirm this court's original conclusion that the Fourth District passes constitutional muster.

II. The Usefulness of an Additional Evidentiary Hearing

As is apparent from the above discussion, the pertinent factual data needed to determine the constitutionality of the Fourth District was before this court upon its initial adjudication of this matter. Neither *Shaw II* nor *Bush* introduces legal guidelines that require additional findings of fact by this court. There is therefore no need to reopen the record and conduct an additional evidentiary hearing. Accordingly, plaintiff's motion to reconsider this court's earlier ruling denying an additional evidentiary hearing in this matter is denied.

Conclusion

For the foregoing reasons, this court affirms its earlier ruling that the Fourth District passes constitutional muster and denies plaintiff's motion to reconsider this court's oral ruling denying plaintiff's motion for an additional evidentiary hearing.

ENTER:
\s\ Michael S. Kanne
Michael S. Kanne
United States Circuit Judge

\s\ Charles R. Norgle
United States District Judge

\s\ David H. Coar
David H. Coar

FN6. Since *King I* was remanded, plaintiff's counsel has directed this court's attention to certain recent decisions of the Court, e .g., Lawyer v. Department of Justice, No. 95-2024, 1997 WL 345240 (U.S.Fla. June 27, 1997) (affirming district court's decision upholding constitutionality of voting district based on low income); Moon v. Meadows, No. 96-1779, 1997 WL 274775 (U.S.Va. June 27, 1997) (summarily affirming district court's invalidation of Virginia's third congressional district for lack of narrow tailoring). After reviewing these decisions, this court finds that none of the cited cases affects the determinations or conclusions stated herein.

United States District Judge

Dated: August 1, 1997

VOTING RIGHTS ACT OF 1965, SECTIONS 2A AND 2B

TITLE I - VOTING RIGHTS

Sec. 2 (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

10 ILCS 5/11-2, COUNTY BOARD TO FIX PRECINCTS AND PLACES OF ELECTION—LIST OF PRECINCTS—ELECTIONS FOR JUDGES

Sec. 11-2. The County Board in each county, except in counties having a population of 3,000,000 inhabitants or over, shall, at its regular meeting in June, divide its election precincts which contain more than 800 voters, into election districts so that each district shall contain, as near as may be practicable, 500 voters, and not more in any case than 800. Whenever the County Board ascertains that any election precinct contains more than 600 registered voters, it may divide such precinct, at its regular meeting in June, into election precincts so that each precinct shall contain, as nearly as may be practicable, 500 voters. Insofar as is practicable, each precinct shall be situated within a single congressional, legislative and representative district and in not more than one County Board district and one municipal ward. In order to situate each precinct within a single district or ward, the County Board shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting. In determining whether a division of precincts should be made, the county board may anticipate increased voter registration in any precinct in which there is in progress new construction of dwelling units which will be occupied by voters more than 30 days before the next election. Each district shall be composed of contiguous territory in as compact form as can be for the convenience of the electors voting therein. The several county boards in establishing districts shall describe them by metes and bounds and number them. And so often thereafter as it shall appear by the number of votes cast at the general election held in November of any year, that any election district or undivided election precinct contains more than 800 voters, the County Board of the county in which the district or precinct may be, shall at its regular meeting in June, or an adjourned meeting in July next, after such November election, redivide or readjust such election district or election precinct, so that no district or election precinct shall contain more than the number of votes above specified. If for any reason the County Board fails in any year to redivide or readjust the election districts or election precinct, then the districts or precincts as then existing shall continue until the next regular June meeting of the County Board; at which

regular June meeting or an adjourned meeting in July the County Board shall redivide or readjust the election districts or election precincts in manner as herein required. When at any meeting of the County Board any redivision, readjustment or change in name or number of election districts or election precincts is made by the County Board, the County Clerk shall immediately notify the State Board of Elections of such redivision, readjustment or change. The County Board in every case shall fix and establish the places for holding elections in its respective county and all elections shall be held at the places so fixed. The polling places shall in all cases be upon the ground floor in the front room, the entrance to which is in a highway or public street which is at least 40 feet wide, and is as near the center of the voting population of the precinct as is practicable, and for the convenience of the greatest number of electors to vote thereat; provided, however, where the County Board is unable to secure a suitable polling place within the boundaries of a precinct, it may select a polling place at the most conveniently located suitable place outside the precinct; but in no case shall an election be held in any room used or occupied as a saloon, dramshop, bowling alley or as a place of resort for idlers and disreputable persons, billiard hall or in any room connected therewith by doors or hallways. No person shall be permitted to vote at any election except at the polling place for the precinct in which he resides, except as otherwise provided in this Section or Article 19 of this Act. In counties having a population of 3,000,000 inhabitants or over the County Board shall divide its election precincts and shall fix and establish places for holding elections as hereinbefore provided during the month of January instead of at its regular meeting in June or at an adjourned meeting in July.

However, in the event that additional divisions of election precincts are indicated after a division made by the County Board in the month of January, such additional divisions may be made by the County Board in counties having a population of 3,000,000 inhabitants or over, at the regular meeting in June or at adjourned meeting in July. The county board of such county may divide or readjust precincts at any meeting of the county board when the voter registration in a precinct has increased beyond 800 and an election is scheduled before the next regular January or June meeting of the county board.

When in any city, village or incorporated town territory has been annexed thereto or disconnected therefrom, which annexation or disconnection becomes effective after election precincts or election districts have been established as above provided in this Section, the clerk of the municipality shall inform the county clerk thereof as provided in Section 4-21, 5-28.1, or 6-31.1, whichever is applicable. In the event that a regular meeting of the County Board is to be held after such notification and before any election, the County Board shall, at its next regular meeting establish new election precinct lines in affected territory. In the event that no regular meeting of the County Board is to be held before such election the county clerk shall, within 5 days after being so informed, call a special meeting of the county board on a day fixed by him not more than 20 days thereafter for the purpose of establishing election precincts or election districts in the affected territory for the ensuing elections.

At any consolidated primary or consolidated election at which municipal officers are to be elected, and at any emergency referendum at which a public question relating to a municipality is to be voted on, notwithstanding any other provision of this Code, the election authority shall establish a polling place within such municipality, upon the request of the municipal council or board of trustees at least 60 days before the election and provided that the municipality provides a suitable polling place. To accomplish this purpose, the election authority may establish an election precinct constituting a single municipality of under 500 population for all elections, notwithstanding the minimum precinct size otherwise specified herein.

Notwithstanding the above, when there are no more than 50 registered voters in a precinct who are entitled to vote in a local government or school district election, the election authority having jurisdiction over the precinct is authorized to reassign such voters to one or more polling places in adjacent precincts, within or without the election authority's jurisdiction, for that election. For the purposes of such local government or school district election only, the votes of the reassigned voters shall be tallied and canvassed as votes from the precinct of the polling place to which such voters have been reassigned. The election authority having jurisdiction over the precinct shall approve all administrative and polling place procedures. Such procedures shall take into account voter

convenience, and ensure that the integrity of the election process is maintained and that the secrecy of the ballot is not violated.

Except in the event of a fire, flood or total loss of heat in a place fixed or established by any county board or election authority pursuant to this Section as a polling place for an election, no election authority shall change the location of a polling place so established for any precinct after notice of the place of holding the election for that precinct has been given as required under Article 12 unless the election authority notifies all registered voters in the precinct of the change in location by first class mail in sufficient time for such notice to be received by the registered voters in the precinct at least one day prior to the date of the election.

The provisions of this Section apply to all precincts, including those where voting machines or electronic voting systems are used.

10 ILCS 5/11-3, Establishment, revision and rearrangement of precincts—Duty of board

Sec. 11-3. It shall be the duty of the Board of Commissioners established by Article 6 of this Act, within 2 months after its first organization, to divide the city, village or incorporated town which may adopt or is operating under Article 6, into election precincts, each of which shall be situated within a single congressional, legislative and representative district insofar as is practicable and in not more than one County Board district and one municipal ward; in order to situate each precinct within a single district or ward, the Board of Election Commissioners shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting and such precincts shall contain as nearly as practicable 600 qualified voters, and in making such division and establishing such precincts such board shall take as a basis the poll books, or the number of votes cast at the previous presidential election. Within 90 days after each presidential election, such board in a city with fewer than 500,000 inhabitants, village or incorporated town shall revise and rearrange such precincts on the basis of the votes cast at such election, making such precincts to contain, as near as practicable, 600 actual voters; but at any time in all instances where the vote cast at any precinct, at any election, equals 800, there must be a rearrangement so as to reduce the vote to the standard of 600 as near

as may be. However, any apartment building in which more than 800 registered voters reside may be made a single precinct even though the vote in such precinct exceeds 800. Within 90 days after each presidential election, a board in a city with more than 500,000 inhabitants shall revise and rearrange such precincts on the basis of the votes cast at such election, making such precincts to contain, as near as practicable, 400 actual voters; but at any time in all instances where the vote cast at any precinct, at any election, equals 600, there must be a rearrangement so as to reduce the vote to the standard of 400 as near as may be. However, any apartment building in which more than 600 registered voters reside may be made a single precinct even though the vote in such precinct exceeds 600.

Immediately after the annexation of territory to the city, village or incorporated town becomes effective the Board of Election Commissioners shall revise and rearrange election precincts therein to include such annexed territory.

Provided, however, that at any election where but one candidate is nominated and is to be voted upon at any election held in any political subdivision of a city, village or incorporated town, the Board of Election Commissioners shall have the power in such political subdivision to determine the number of voting precincts to be established in such political subdivision at such election, without reference to the number of qualified voters therein. The precincts in each ward, village or incorporated town shall be numbered from one upwards, consecutively, with no omission.

The provisions of this Section apply to all precincts, including those where voting machines or electronic voting systems are used.

SECRET BALLOT LAW - PART 9.1 VOTER'S PRIVILEGE

5/8-910. Voter's Privilege

§8-910. No person shall be compelled to disclose, in any proceeding conducted by a court, commission, administrative agency, or other tribunal in the State, the name of any candidate for whose nomination, election, or retention in office the person voted, or whether the person voted for or against any question of public policy, as defined in Section 1-3 of the Election Code, at any election held within this State.

EXCERPT TEXT OF DIRECT EXAMINATION TESTIMONY OF PLAINTIFF'S WITNESS, CHRISTOPHER J. CLEVELAND

[155] JUDGE KANNE: Plaintiff's 41 is admitted. Q: And what did this particular section of the 4th Congressional District show you? A: Well, this particluar section shows the raggedness of the boundary in some detail. I don't know how easy it is to actually see the boundary from that distance, but if you follow along, you can see that it picks block by block along the corridor those Hispanic blocks that have the highest density. There are other Hispanics on the other side of the border, but it appears that these were drawn in such a way as to maximize the Hispanic content. For example, as you travel downward here, you can see that the district cuts east again to pick up heavily [156] Hispanic block, which has a substantial population. As you travel west, again you are grabbing the corridor of Hispanic population. There are occasional white blocks within this connector area here and here, for example. These are, for the most part, zero population blocks that correspond to parks or empty industrial land. So they have no effect upon the racial content of the district. It's particlularly useful to note the detail with which they do it. This for example, is just wandering out into the neighborhood, block by block, grabbing one, grabbing one there. Here it's gone up to grab individual blocks with heavy Hispanic content.

HISPANIC POPULATION IN THE TOWNSHIPS OF THE "WESTERN CONNECTOR" (EXCERPT FROM DEFENDANT EXHIBIT D-I 2)

	3rd Congressional District				4th Congressional District				5th Congressional District			
	Total Pop.	White Pop.	Hisp. Pop.	% Hisp	Total Pop.	White Pop.	Hisp. Pop.	% Hisp	Total Pop.	White Pop.	Hisp. Pop.	% Hisp
Cicero	39,480	29,675	8,899	22.5	27,956	11,484	16,032	57.3				
Leyden					1,608	1,512	89	5.5	73,409	62,711	8,629	11.8
Oak Park	7,698	5,967	309	4.0	901	626	43	4.8				
Proviso	7,962	6,317	387	4.9	13,339	4,846	7,599	57.0	16,519	13,303	2,602	15.8
River Forest					0	0	0	0.0				
Riverside	13,379	12,876	369	2.8	0	0	0	0.0				
Stickney	37,063	34,535	2,020	5.5	234	34	191	81.6				

EXCERPT AFFIDAVIT TESTIMONY OF ORESTES AGUILLON, PLAINTIFF'S EXHIBIT 9

6. I used GIS plus software to analyze Cook County's Hispanic population to determine the possibility of creating a majority Hispanic congressional district. I have determined that a majority Hispanic district can be created with basically three different configurations. These configurations include joining Cook County's north/south Hispanic populations around the west, ("western connector"), through the middle ("middle connector") and using a connector around the east ("eastern connector"). These different connectors can render several configurations for a Hispanic congressional district all with a Hispanic population ranging from 63.0% to 65% of the total population.

7. Joining Cook County's north/south Hispanic populations by the use of a connector is necessary in order to create a majority Hispanic congressional district. In all the plans I developed, in addition to creating a majority Hispanic district, I also made sure that the existing 7th congressional district as well as the 1st and 2nd districts, all had total African-American populations of 65% and above.

8. The configuration for the specific congressional Hispanic districts which I created are as follows:

Eastern Connector Map (Exhibit A)

The first Hispanic congressional district that I developed, (Exhibit A), contained a total Hispanic population of 63%. Although the percentage of Hispanic population could be increased to near 65%, at the request of the Committee, I began to explore other alternative configurations.

Middle Connector Map I (Exhibit B)

The next alternative which I developed involved the use of a middle connector to connect north/south Cook County's Hispanic populations. (Exhibit B). The connector is bounded on the west side by Western Avenue and Damen Avenue on the east side. This configuration has a total Hispanic population of 64.2%. Although the percentage of the Hispanic population for the middle connector district

could be increased to near 65%, at the request of the Latino Committee I began to explore another alternative configuration.

Middle Connector Map II (Exhibit C)

In conjunction with the representatives from the Chicago Urban League, and the African-American plaintiffs named in the Nieves complaint I developed another alternative, the middle connector Hispanic congressional district II. This map contains a Hispanic total population of 64%. The connector boundaries for this configuration are the Chicago River on the east side, and Halsted Street on the west side. The middle eastern connector map was the result of lengthy negotiations among the African-American plaintiffs named in Nieves complaint, the Hispanic plaintiffs, and the Latino Committee.

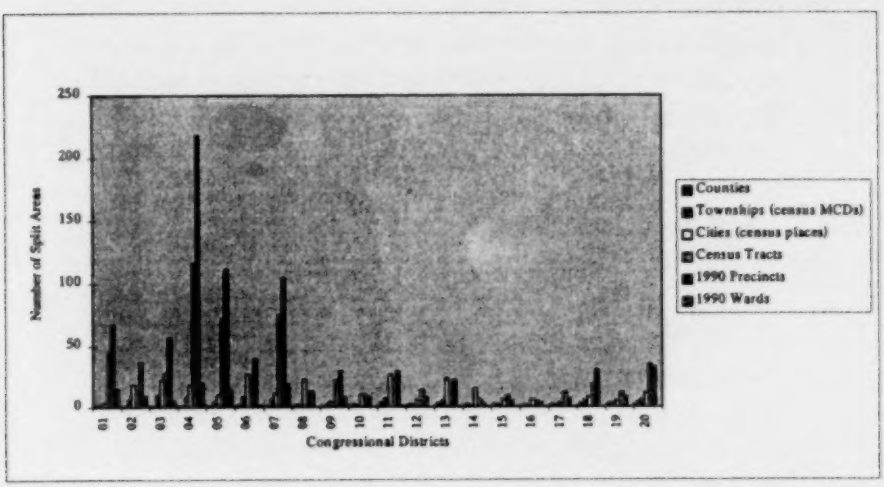
Western Connector Map (The Urban League Map) (Exhibit D)

Subsequently, the Chicago Urban League developed an Hispanic district which joined north/south Cook County's Hispanic population through a connector on the west side. I analyzed this map, and made adjustments in order to increase the percentage of the Hispanic population in the Hispanic district. The Hispanic district in the Urban League's map, as submitted to this Court has a Hispanic population of 63.8%. A similar map was also proposed by the Collins/Hayes plaintiffs.

EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON SPLIT POLITICAL SUBDIVISIONS

Split Political Subdivisions

Congressional District	Number of areas that were split					
	Counties	Townships (census MCDs)	Cities (census places)	Census Tracts	1990 Precincts	1990 Wards
01	1	2	4	45	67	15
02	1	6	19	13	36	9
03	1	9	22	28	56	5
04	1	8	18	116	218	20
05	1	4	10	71	111	14
06	2	8	27	24	39	1
07	1	6	11	75	105	19
08	2	2	22	12	13	NA
09	1	3	5	22	29	8
10	2	1	10	10	8	NA
11	4	7	26	23	29	1
12	2	2	6	14	8	NA
13	3	5	23	14	22	NA
14	2	1	15	6	3	NA
15	2	2	6	9	5	NA
16	1	1	6	5	3	NA
17	2	2	3	12	7	NA
18	3	6	8	19	30	NA
19	3	2	5	12	8	NA
20	4	6	12	35	32	NA
Average	1.95	4.15	12.90	28.25	41.45	10.22



PERCENTAGE OF POPULATION IN SPLIT PRECINCTS
PLAINTIFF'S EXHIBIT 53

Split Precinct Statistics (1990 VTDs)

Cong Dist	Total precincts in or split by the district	Split precincts	% of precincts that were split	Population	Population in split portion of district	% of district's population living in split areas
01	717	67	9%	571,530	26758	5%
02	548	36	7%	571,530	16323	3%
03	622	56	9%	571,531	29698	5%
04	423	218	**52%**	571,530	120584	**21%**
05	598	111	19%	571,530	61124	11%
06	442	39	9%	571,530	19432	3%
07	653	105	16%	571,530	50779	9%
08	431	13	3%	571,530	6774	1%
09	565	29	5%	571,530	12134	2%
10	523	8	2%	571,530	3855	1%
11	428	29	7%	571,530	18380	3%
12	399	8	2%	571,530	6177	1%
13	372	22	6%	571,531	10455	2%
14	387	3	1%	571,530	388	0%
15	386	5	1%	571,530	1255	0%
16	385	3	1%	571,530	759	0%
17	363	7	2%	571,530	4446	1%
18	481	30	6%	571,530	12778	2%
19	471	8	2%	571,530	5260	1%
20	424	32	8%	571,530	16518	3%

TESTIMONY OF PLAINTIFF'S WITNESS, MANUEL TORRES

[Direct Examination] [344] Q: And as a campaign activist, you find it difficult to work this kind of election where the boundaries are so jagged, is that it? A: Absolutely right. It's too confusing. The people, the workers, it's too hard to manage a campaign when you don't know exactly where the boundaries are. It's even more difficult when the voters themselves are not aware that they are in those kinds of boundaries.

[Cross-Examination] [349] Q: Now, the 1992 campaign was the first election under the lines of the 4th Congressional District as it currently stands, right? A: Yes. Q: And when you went campaigning, did you advise people that they were in the 4th Congressional District? A: If we knew, we did. If we didn't, it was confusing. A: So you campaigned even though you didn't know what congressional district you were going to be in. A: The problem with the 4th congressional district was that it was so jagged on the edges. In particular, you know, one side of the street was in, or half the precinct was in. The neighbors didn't know — the neighbors didn't even realize if they were in or out. * * * Q: Is it your position that precincts were split in the 4th Congressional District in the 1992 election? A: Yes, there were some split precincts. Q: And you were a precinct captain at the time? A: No. Q: You were just a campaign worker. A: Yes. Q: And you were able to give them information about the congressional district? A: In terms of the issues. Q: Or in terms of whether or not they reside in the congressional district. A: If I had that information, I would give it. I would give it to them if we knew definitely, but it was somewhat confusing. Q: If you knew at the time. A: If I knew at the time.

EXCERPT TEXT OF CROSS EXAMINATION TESTIMONY OF DEFENSE WITNESS JAMES LEWIS

[659] BY MR. MARKHAM:

Q: Would another effect of a connector of this sort be that there would be some precincts in which there would be very few voters? A: There are — well, I don't know — I don't know the rules by which precincts are drawn. They may have to include voters if they are indeed precincts. I don't have information to that effect.

Q: And if there are precincts that have 6 or 10 or 12 people, it would be possible if few enough of them would participate in the election and if they all voted for the same candidate, that they would effectively lose the secrecy of their ballot, would they not? A: I mean that's a hypothetical. I don't know whether that in effect exists. I suppose if there were a precinct with so few people, I suppose that is hypothetically possible. Q: I would like to show you what we have marked as Plaintiff's Exhibit 57. * * *

Q: And I'll represent to you that these are the election results for the 1994 general election in congressional district No. 4. I would like to ask if you would — * * * Q: If you would look at the election results that are reflected with respect to Proviso precinct No. 132 of the November 8, 1994 election, can you tell me whether all the persons who reside in that precinct and are reported in this election result voted for the same candidate in that race? * * * A: If this is indeed all the persons who voted, there is one vote cast, they would have voted for that candidate, that's correct. Q: And if that information is public with respect to who that person is, that person has effectively lost the secrecy of their ballot? If that information is available — A: If that information is public and their name is identified, that would be correct. Q: And similarly, in Stickney precinct No. 40, the election results for that contest reflect that all persons who cast ballots in the Gutierrez-Valtierra race in November 8, 1994, in that precinct voted for the same candidate, did they not? A: According to this, that's correct. Q: And the vote reflects a two to nothing vote? A: Right.

EXCERPT FROM PLAINTIFF'S EXHIBIT 57

General Election, Cook County, Illinois
Tuesday, November 8, 1994

***

Representative in Congress - 4th
07 (Dem) Luis Gutierrez
08 (Rep) Steven Valtierra

***

	07	08
***		
Proviso 132	1	0
***		
Stickney 40	0	2

EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON CITIZENSHIP

In *Hastert v. State Board of Elections*, the Federal District Court agreed with both the plaintiffs and the defendants that a congressional district is considered a "safe" seat if the particular minority is constitutes 65% of the population or 60% of the voting age population (VAP). Safe seats are commonly defined in this way.

I examined the fourth congressional district to determine if Hispanics could effectively form a 65% or 60% voting majority. I found that they could not, given that only citizens vote, and that a substantial portion of Hispanics in the City of Chicago are not citizens.

Citizenship in the City of Chicago (VAP)

Citizens*:	1,807,120
Hispanics:	345,307
Hispanic Citizens*:	194,438
Percent of Hispanics who are Citizens:	56.30%

Citizenship in the fourth congressional district:

	Total	Hispanic	Percent Hispanic
Persons	571,530	371,663	65.03%
VAP	383,497	226,974	59.19%
VAP Citizens	270,839	120,850	44.62%

I found that eligible Hispanic voters constitute less than half of the total eligible voters in the fourth congressional district. Hispanics are actually a voting minority in the fourth.

---

* Based on Census Bureau special tabulation. Data is for block groups which do not correspond with city or congressional boundaries. An allocation algorighm was used. Total estimated error is <1%.

Other Districts

I found that several of the other districts that Dr. Lichtman identified as Hispanic-majority are actually Hispanic minority when citizenship is taken into account.

District	Percent Hispanic in the Lichtman Report	Percent VAP Hispanic including citizenship
Circuit Court,6	51%	43%
Circuit Court, 14	51%	33%
Fourth CD	60%	45%
County Commission 7	57%	38%
County Commission 8	57%	48%
12th Ward	66%	44%

Variation in Citizenship Rates

The percentage of Hispanics who are citizens varies widely across the city, from a low of 20-30% in some 12th Ward precincts to 100% in some 1st Ward precincts.

TESTIMONY OF CHRISTOPHER CLEVELAND ON CITIZENSHIP

[160] Q: What percent of the 4th Congressional District is Hispanic? A: Well, based upon total population, its approximately 65 percent. Based upon voting age population, its almost 60 percent, 59 point something percent. Based upon citizenship data, its under 45 percent.

[293] A: 45 percent of the 4th Congressional District is comprised of Hispanic citizens, voting age population citizens. . . . Now, I should add a caveat to that, that . . . actual number is actually considerably lower than that. That was actually an upper balance when I calculated both for various reasons.

. . .

[294] The problem is overreporting of citizenship among Hispanics. There is known problem that the Census Bureau has published on which is that frequently noncitizens, it's a self-reported citizenship rate. Noncitizens over report their citizenship.

[689] Q: I am now going to be referring to Plaintiff's Exhibit Number 56.

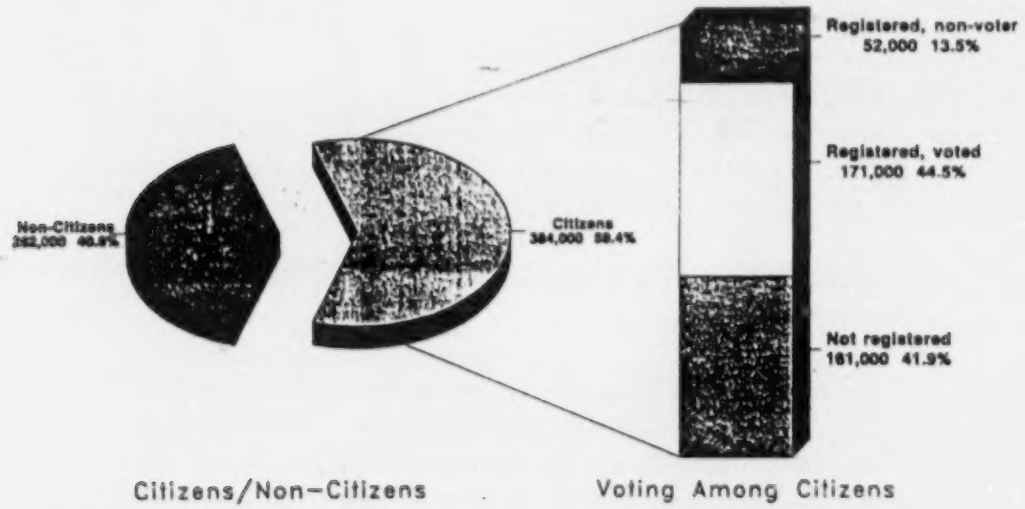
. . .

A: I found that at least with regard to the citizenship calculations or the calculations that I did, our numbers are pretty much in sync. They pretty much line up. These are for 1992 data. I used 1990, but still it is pretty close. Q: An what does this report indicate then? Q: It just talks about the percentage of citizens, amongst other things,

EXCERPT FROM PLAINTIFF'S EXHIBIT 56 - LATINO INSTITUTE INFORMATION ON CITIZENSHIP

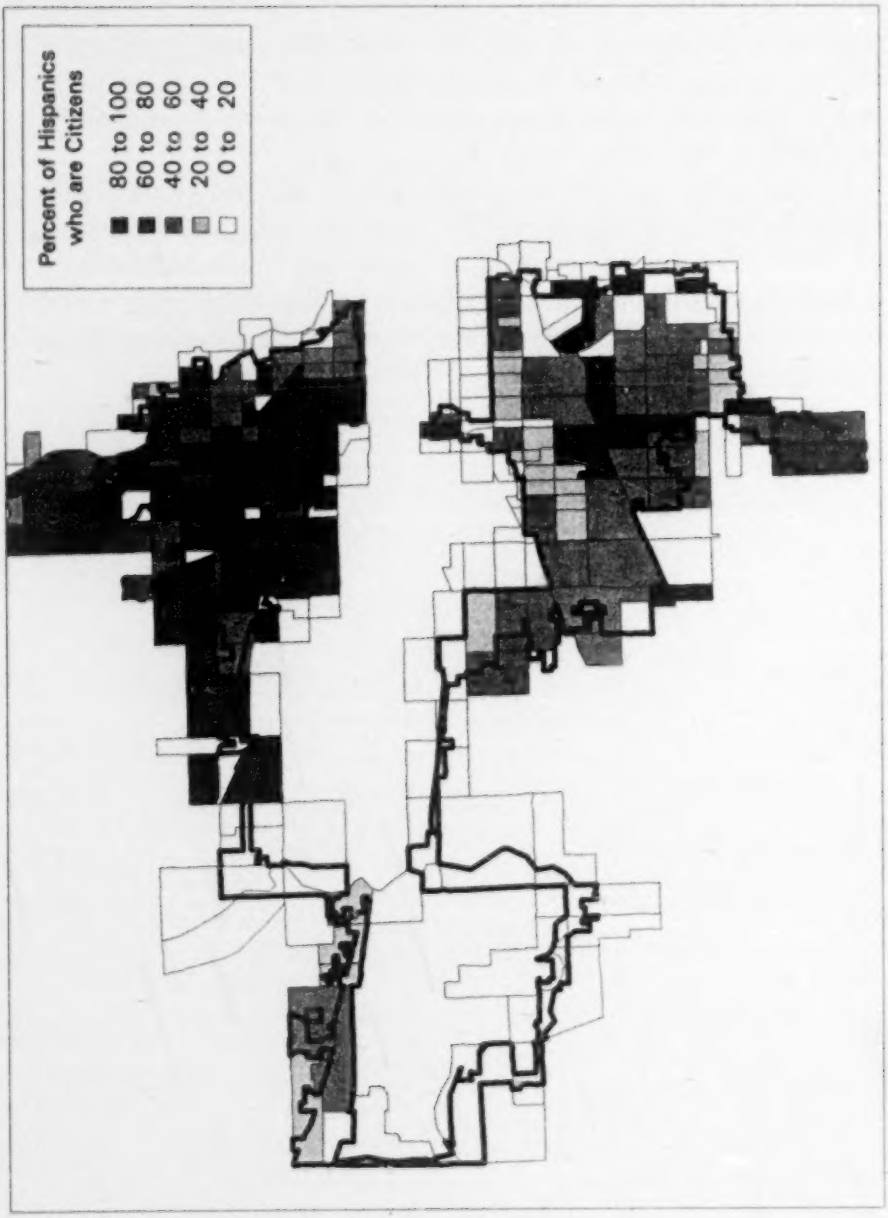
Latino Registration and Voting

Illinois: 1992



Universe: 646,000 Latino Adults
Source: 1992 Current Population Survey; 1990 Census Public Use Microdata Samples
LATINO INSTITUTE RESEARCH, 1994

EXCERPT FROM PLAINTIFF'S EXHIBIT 30, PERCENT OF HISPANICS WHO ARE CITIZENS



EXCERPT FROM DEFENDANT INTERVENORS
EXHIBIT 22, AL FILO, PAGE 10

One of the reasons why the percentage of Latino registered voters is so low is that it is not sufficient to be 18 years old to register, one must also be a U.S. citizen. Thus, although there are substantial numbers of Latinos in Chicago who are at voting age, we estimate that 44 percent of the 1986 Latino population in Chicago 18 years and older are ineligible to participate in the electoral process for lack of U.S. citizenship status.

The ineligible groups are composed of both individuals who currently hold permanent resident visas and also undocumented workers. The number of legal residents is estimated to be very significant among Latinos in Chicago. The Immigration and Naturalization Service (INS) reported 68,665 Hispanic resident aliens in 1980 representing 16 percent of Chicago's Latinos.

EXCERPT FROM DEFENDANT INTERVENORS
EXHIBIT 55, PAGE 102

1994 Metro Report
MCIC Table #24

***

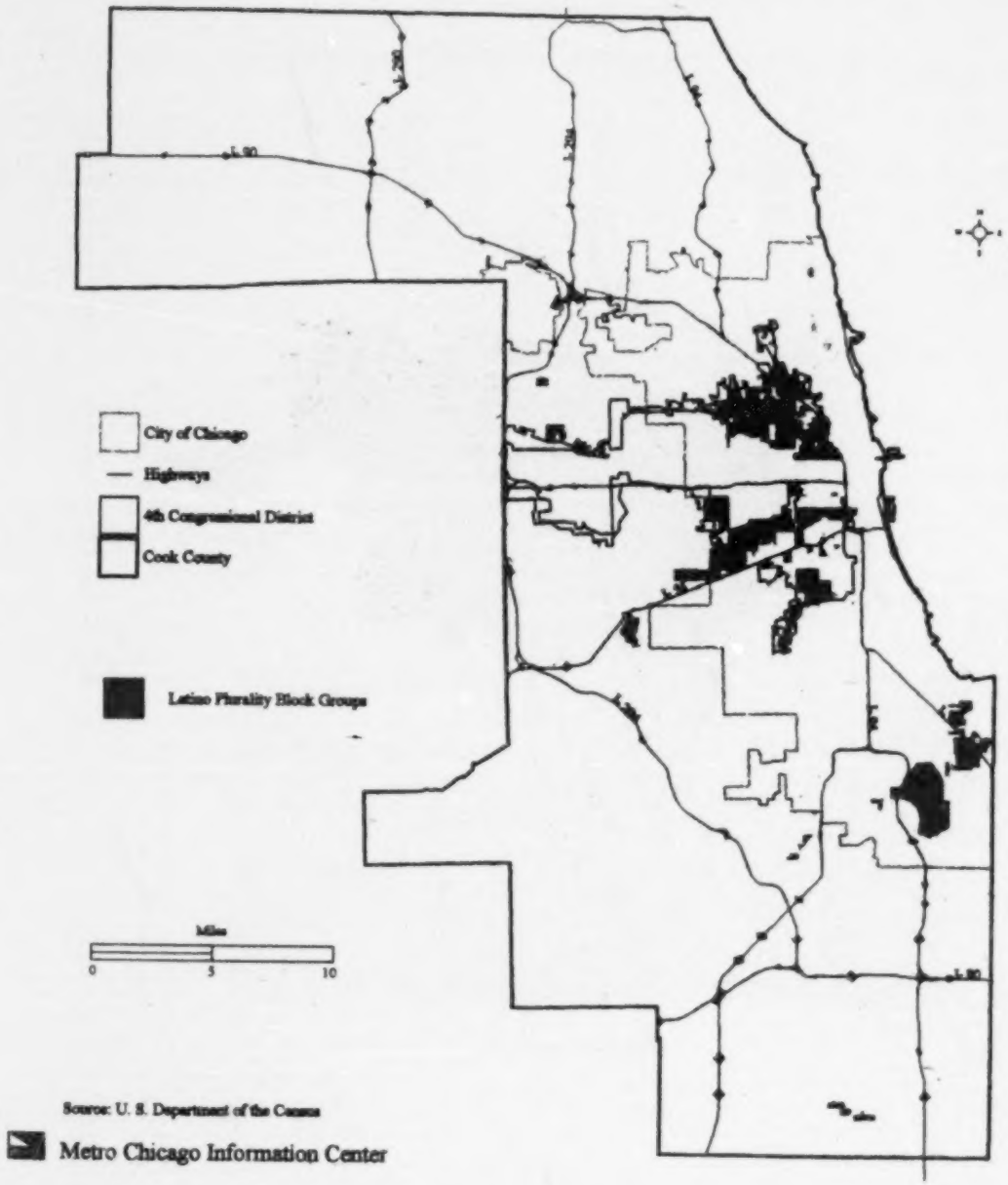
	Race		
U.S. Citizenship	White	Black	Latino
	98%	98%	61%

EXCERPT FROM DR. D. GARTH TAYLOR'S REPORT -
DEFENDANT INTERVENOR
EXHIBIT 6 PAGE 8-9

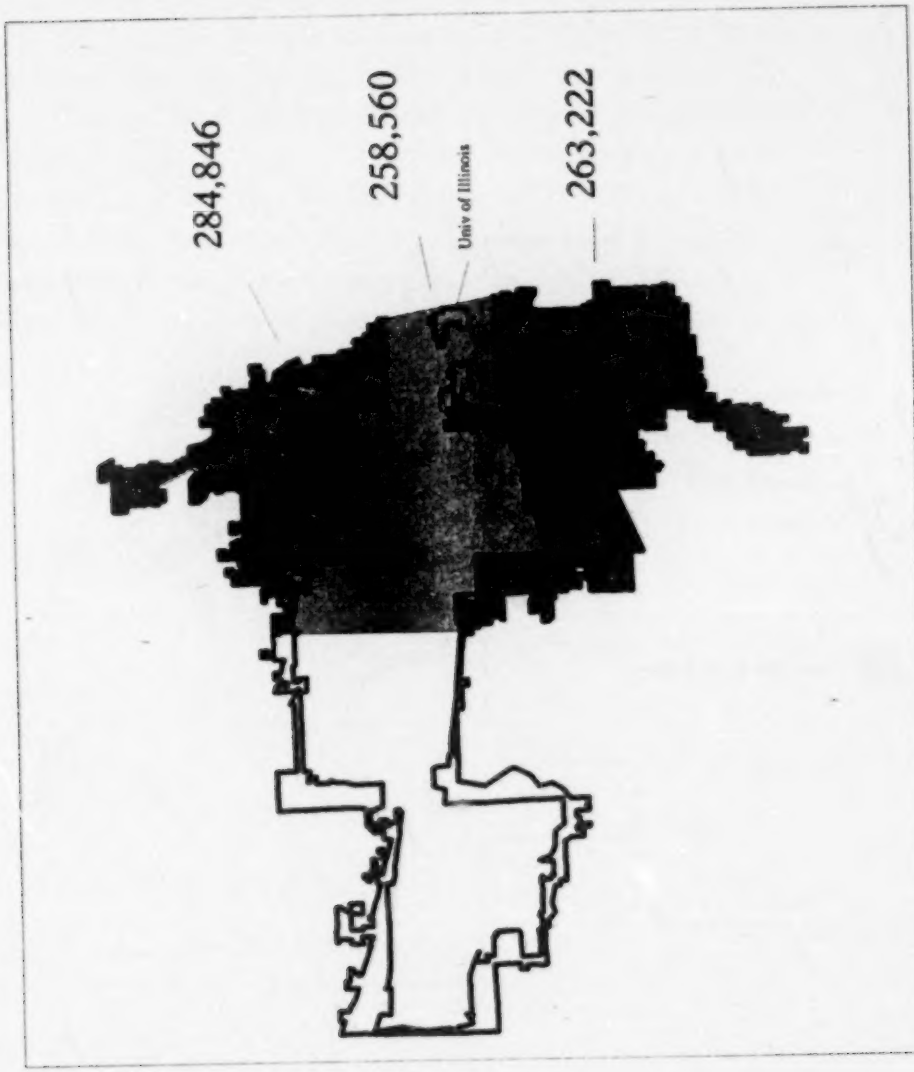
51. According to the 1990 Census, there are 535,315 Latinos living in the city of Chicago, of whom 348,040 are Mexican, and 121,209 are Puerto Rican. According to the U.S. Immigration and Naturalization Service, 87,074 Mexican-Americans in Chicago applied for amnesty as of February, 1992 under the Immigration Reform and Control Act and can be eligible for naturalization after five years. According to the U.S. Immigration and Naturalization Service, the number of Mexican-Americans who have been granted citizenship each year since 1990 is:

	Granted Citizenship
1990	2,112
1991	1,171
1992	1,105
1993	3,491
1994	3,498

EXCERPT FROM DR. D. GARTH TAYLOR'S REPORT -
DEFENDANT INTERVENOR EXHIBIT 6
MAP OF HISPANIC PLURALITY BLOCK GROUPS



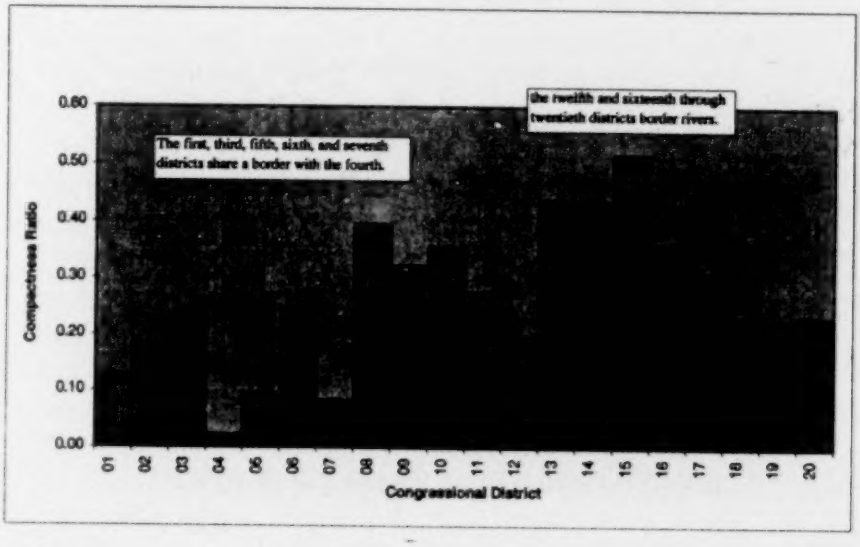
PLAINTIFF'S EXHIBIT 29, MAP OF THE POPULATION BETWEEN THE "ISLANDS" OF HISPANIC POPULATION



EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON COMPACTNESS

Compactness of Illinois Congressional Districts
(not adjusted for natural borders)

District	Area (square miles)	Perimeter (miles)	Compactness Ratio
01	56.81	74.61	0.13
02	127.94	92.91	0.19
03	127.54	81.50	0.24
04	39.76	151.31	0.02
05	52.77	85.15	0.10
06	184.87	97.49	0.24
07	51.50	87.63	0.08
08	453.71	120.13	0.40
09	53.76	45.82	0.32
10	246.09	93.37	0.35
11	2629.04	346.44	0.28
12	3610.57	480.70	0.20
13	410.42	108.48	0.44
14	2460.13	266.58	0.44
15	7510.38	427.26	0.52
16	3128.14	330.36	0.36
17	8459.31	624.44	0.27
18	6259.96	505.37	0.31
19	10840.51	818.87	0.20
20	9591.81	715.31	0.24
Average	2814.75	277.59	0.27



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	Hon. Michael S. Kanne
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	Hon. Charles R. Norgle, Sr.
	)	Hon. David H. Coar
	)	
Defendant Intervenors.	)	

ADDITIONAL TRIAL BRIEF OF PLAINTIFF

This court requested that the Plaintiff respond to the arguments of the Democratic National Committee and Department of Justice (hereinafter referred to as "Defendants") on the issues regarding the standing of the Plaintiff to challenge the previous court-ordered plan in the case of Hastert et al. v. State Board of Elections; and

consequently, what changes, if any would result upon the Plaintiffs proof, and more particularly, how the Defendants would be permitted to frame their proof.

I. DEFENDANTS' ARGUMENT THAT PLAINTIFF IS SEEKING TO MODIFY A PREVIOUS COURT ORDER IS UNFOUNDED.

Defendant-Intervenors assert that "the plaintiff is seeking to modify the Hastert order, and should not be allowed to relitigate the findings of the Hastert court and question the admissibility of the Hastert evidence . . ." and that somehow this works as a "procedural sleight of hand." Defendant-Intervenor's Brief, pp. 20. By making this argument, the Defendant-Intervenors are asserting that this Court make the unfounded presumption that the Plaintiff has standing to modify the order in the first place.

The Plaintiff has no standing to modify the Hastert order under Federal Rule 60(b). As the Plaintiff addressed in his Response to the State Board of Elections Motion to Dismiss, the Plaintiff cannot, even if he so desired, seek to modify the order in Hastert. Federal Rule 60(b) says in plain lanuage that only parties or their privies may seek such relief. Rule 60(b) begins by saying: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . ." Id. (emphasis added). This concept is confirmed by the case law.

In National Acceptance Company of America, Inc. v. Frigidmeats, Inc., 627 F.2d 764 (7th Cir. 1980) where a creditor, not a party to the proceedings, sought relief under Rule 60(b) to vacate a turnover order of a Bankruptcy court, the Seventh Circuit said that denial of the relief was appropriate because "[i]t is well settled that . . . `one who was not a party lacks standing to make [a 60(b)] motion." Id. at 766 (brackets in original). See, also, U.S. v. West Willow Apartments, Inc., 245 F.Supp. 755 (D.C.Mich. 1965), and 11 Wright, Miller & Kane °2865 (1995) (with the exception of a privity of a party, one who was not a party lacks standing to make the motion under Rule 60).

Defendants do not cite any authority for Plaintiff having standing to assert his claim in the Hastert litigation; they seek to assert a remedy which the Plaintiff cannot exercise. Department of Justice cites Donohoe v. Consolidated Operating & Production, 30 F.3d

907 (7th Cir. 1994) as relevant. In that case, however, the court discussed the "law of the case" doctrine, which is without applicability here. Id. at 910. A trial court applying the "law of the case" doctrine will treat a determination of law, once made, as correct "throughout all subsequent proceedings except when the issue is raised in a higher court." Law Dictionary, Barrons, 1984.

Department of Justice is apparently asserting that the "law of the case" of Hastert applies to the instant case. This assertion presumes first, however, that the Hastert action and the instant case are the same matter which, even as matters stand now, they are not. And, second, this assertion also presumes that the Plaintiff James King was a party to Hastert, which he was not.

II. PLAINTIFF, JAMES R. KING, AT ALL TIMES AFTER THE ORDER ENTERED IN HASTERT ET AL. V. STATE BOARD OF ELECTIONS, WAS PERMITTED TO FILE HIS OWN ACTION.

Plaintiff James R. King's lack of standing to modify the order in Hastert, in turn, does not preclude him from filing a separate and distinct action. The Supreme Court's opinion in Martin v. Wilks, 409 U.S. 753, 109 S.Ct. 2180 (1989) is on point. In Martin, a group of black individuals filed suit against the City of Birmingham, Alabama and county board for racially discriminatory hiring and promotion practices; eventually a consent decree was entered which set forth a remedial scheme. Id. at 2183. Subsequently, a group of white firefighters, brought suit separately against the City and county board for making race-conscious employment decisions; the black individuals in the prior case were granted leave to intervene in that case. Id. Each of these were different titled suits. Id. The District Court entered a motion to dismiss, concluding that

> if in fact the City was required to [make promotions of blacks] by the consent decree, then they would not be guilty of [illegal] racial discrimination' and that the defendants had 'establish[ed] that the promotions of the black individuals . . . were in fact required by the terms of the consent decree.'

Id. at 2184.

The Eleventh Circuit reversed saying "[b]ecause . . . [the Wilks respondents] were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded." Id. The Supreme Court affirmed saying

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure °4449 p.417 (1981).... A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings.

Id. at 2184.

In the instant case, a prior order was entered in Hastert regarding the configuration of the Illinois Congressional plan, to which there was an agreement respecting the part of the plan which the Plaintiff in the instant case is challenging, namely the Fourth Congressional District. The Plaintiff, James King, filed an independent and separate action apart from Hastert over three (3) years later challenging that plan on both grounds that were covered by the Hastert court, in addition to the Constitutional grounds.

The Defendants are asserting that this Court, like the district court in Martin, in effect, make the same determination with respect to the order entered in Hastert: 1) hold that it is unassailable, and 2), that the Plaintiff is bound by that order. In the instant case the Plaintiff did in fact properly follow the rules of procedure by filing an independent and separate action, to which he is fully entitled according to the Court in Martin. See, also, U.S. v. City of Chicago, 978 F.2d 325 (7th Cir. 1992) ("In general, a judgment or decree among parties to a lawsuit does not bind a third party who has not been made a party to the litigation."); Cf., Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986)("parties who choose to resolve litigation through through settlement may not dispose of the claims of a third party . . . without that party's agreement.")

Further, like the Defendants in the instant case, the Petitioners in Martin contended that "the possibility for inconsistent judgments exists". Id. at 2187. The Court rejected this saying that acceptance of this argument "would require a rewriting rather than an interpretation of the relevant Rules.... [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling

cases like these." Id.

It is also important to note that the petitioners in Martin, like the Defendants in the instant case, asserted that "because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible 'collateral attack.'" Id. The Supreme Court rejected this argument, quoting Justice Brandies in Chase National Bank v. Norwalk, 291 U.S. 431, 54 S.Ct. 475 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. Id. at 441, 54 S.Ct., at 479.

Id. at 2185. The arguments of Defendants should be rejected on the same grounds. It would have been feasible for the Plaintiff to file, but at the same time, the Plaintiff likely would have been bound by stare decisis, at least until the Supreme Court rendered its decision in Shaw v. Reno in 1993. See 18 Wright, Miller, & Cooper °4449 (1981).

III. IF PLAINTIFF IS NOT BOUND BY THE PRIOR ORDER ENTERED IN HASTERT, PLAINTIFF IS ENTITLED TO CHALLENGE ANY LEGAL OR FACTUAL DETERMINATION, SUBJECT TO STARE DECISIS IN A LIMITED WAY.

The Plaintiff, James R. King, would be bound by a factual finding in Hastert only if this court finds that there was collateral estoppel, or issue preclusion.

Collateral estoppel will prevent the relitigation of an issue only when four prerequisites are met. First the party against whom the collateral estoppel is asserted must have been fully represented in the prior litigation. Second the precluded issue must be identical to the issue involved in the prior litigation. Third, the issue must have been actually litigated and decided on the merits. Finally resolution of the issue must have been necessary to the court's judgment. Prymer v. Ogden, 29 F.3d 1208 (7th Cir. 1994). Without even addressing all the prerequisites, it is sufficient for Plaintiff to assert, as Plaintiff has elsewhere, that he was not a party to the Hastert litigation.

In Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987), a prison

inmate filed suit under °1983 alleging use of tear gas in an incident that resulted in unconstitutional injury. Id. at 875. A prior lawsuit covering the same use of tear gas, Woods v. Norris, ruled that its use was reasonable and necessary. Id. at 877. The District court granted summary judgment on behalf of the Defendants, reasoning that the findings of fact in Woods resolved any identical fact questions. Holloway at 878. As in the instant case, the Defendants are asserting that the Plaintiff is bound by the prior court order in Hastert and its findings on the issues therein. The Eighth Circuit rejected the district court's analyis saying that the plaintiff cannot be collaterally estopped by virtue of a determination in another case in which he was neither a party nor in privity with another party. Applying collateral estoppel against him here would abrogate the fundamental requirement of due process: [plaintiff's] claim would have been adjudicated in Woods without his having had an opportunity to be heard. . . . The findings in Woods cannot preclude Holloway from litigating the same issues in this case. Holloway at 878 (citations omitted). See, also Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) (where prior criminal case determined that there was no violation of Posse Comitatus Act, Plaintiffs were entitled to relitigate issue surrounding violation of Act where no Plaintiffs were parties to the prior criminal case); and Gilbert v. Ben-Asher, 900 F.2d 1407 (9th Cir. 1990) ("As a general matter, only persons who were parties to the prior action may be bound by the findings and conclusions of that action" (emphasis added)); and 18 Wright, Miller, & Cooper °4449 (1981) ("The rule that nonparties cannot be bound by a judgment ordinarily means that the judgment is not even admissible as evidence of the facts found. At the same time, the judgment carries the ordinary precedential weight of stare decisis.") Likewise this court has no authority to bind the Plaintiff to the findings made in the Hastert litigation, except to the extent that stare decisis applies.

Even in light of stare decisis, however, Plaintiff's should be given the opportunity to furnish new information regarding the findings that the Hastert court made to which the Defendants would assert that stare decisis applies to certain findings. See, Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) ("[our previous decision] does, however, stand as a binding precedent in this Circuit on the interpretation of the Act"). In the instant case, the Plaintiff submits that the law on the understanding of °2 of the Voting Rights Act has

substantially changed, to which the stare decisis of this court on that issue is no longer applicable.

In respect to the other findings of the Hastert court, for example, on past discrimination against Hispanics, the applicability of stare decisis does not preclude the Plaintiff from having his day in court, wherein the Defendants must make their showing. There must be a certain limit to which a court can exercise judicial notice of facts, which cannot be to the detriment of a litigating party. "Judicial notice is permitted of facts that are generally known within the territory of the court's jurisidiction or are capable of accurate and ready determination from a source whose accuracy is beyond a reasonable doubt." Fed.R.Evid. 201(b). The court in Holloway said

> [t]he fact that the judge made that finding in Woods [that the use of tear gas was reasonable and necessary] is a judicially noticeable fact; but that fact is irrelevant in this case, unless it is used as a predicate for the application of collateral estoppel, which is inappropriate. . . . Whether the gassing was reasonable and necessary can be determined only by evaluating the testimony and credibility of various witnesses; this is not the kind of fact contemplated by Rule 201.

Holloway at 879.

For these reasons the arguments of the Defendants should be rejected, and the Plaintiff given his day in court.

James C. Ten Broeck, Jr. /s/ _

ATTORNEY FOR PLAINTIFF

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EXCERPT AFFIDAVIT TESTIMONY OF ROBERT J. SAWICKI

1. My name is Robert J. Sawicki. I am Assistant Executive Director of the Chicago Board of Elections Commissioners. I have been employed by the Chicago Board of Election Commissioners (hereinafter "CBEC") for twenty-three years, eleven months, and have served in the capacity of Assistant Executive Director for fifteen (15) years and five (5) months.

2. As Assistant Executive Director, my general responsibilities include assisting the Executive Director of the Chicago Board of Elections Commissioners in the operations of voter registration and election activities. The CBEC has the statutory authority to change precinct lines after redistricting and between elections when it deems it practicable.

3. The Districts and Boundaries Department is the department of the CBEC in charge of recommending changes to precinct boundaries to the CBEC and implementing those changes when approved by the CBEC. The department assesses the fluctuation of registered voters and maintains information regarding the number of registered voters in each precinct within the City of Chicago.

* * *

4. The Illinois Election Code provides that the CBEC should create precincts whenever practicable with 400 actual voters. If the number of registered voters in a precinct increases to 800, or if the number of actual voters in the previous election is over 600, the CBEC must realign the precinct boundaries so that the number of registered voters is maintained at or near 600. 10/ILCS 5/11-3.

5. The average number of registered voters per precinct in the city of Chicago is approximately 525 to 550.

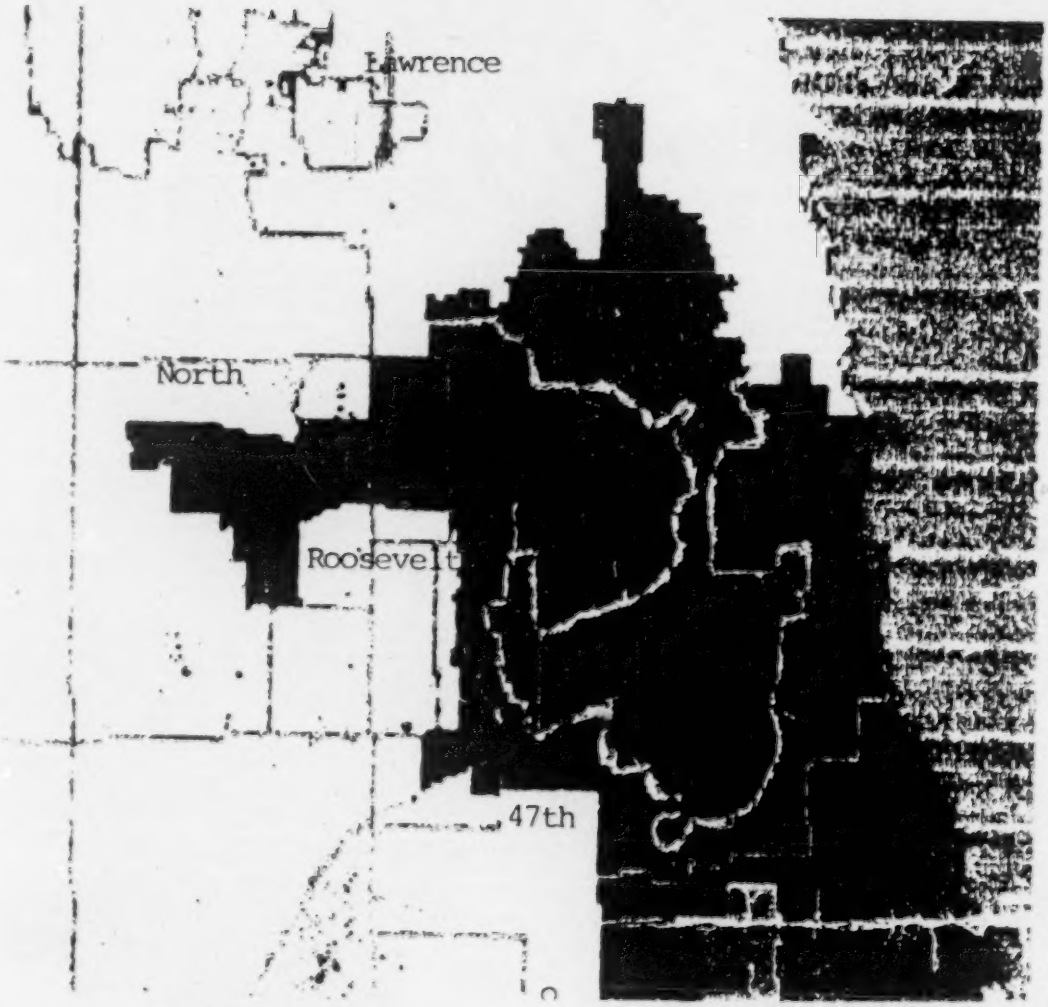
6. In drawing precinct boundaries, the CBEC tries to follow district lines. The Districts and Boundaries Department tries to avoid the creation of unnecessary multi-district precincts. Multi-district precincts are precincts whose boundaries cross more than one political subdivision. For example, a precinct whose boundaries crosses congressional, state legislative or judicial subcircuit boundaries. However, there is no statutory prohibition of such precincts. Since 1992, the CBEC has assigned two (2) extra poll judges in each multi-precinct.

* * *

9. * * * Although the congressional and state legislative district lines were changed in 1991 for the 1992 elections, the CBEC was not able to realign the precincts in the City of Chicago for the 1992 primary elections because the CBEC received the information on the new district lines very shortly before the elections.

10. For the March 1992 primary elections, the CBEC used the existing precincts, despite the congressional, state representative and senate, and judicial subcircuit lines that had been newly created, due to time constraints. At that time, there were approximately 400-450 multi-district precincts. In the summer of 1992, the CBEC undertook to realign the precincts to the new district boundaries. Since the new district boundaries for the state senate, state representative, and congressional districts, judicial subcircuits and aldermanic wards were implemented, the number of multi-district precincts has been reduced to approximately 100. * * *

"MIDDLE CONNECTOR" MAP I, ATTACHMENT TO AFFIDAVIT OF ORESTES AGUILLON



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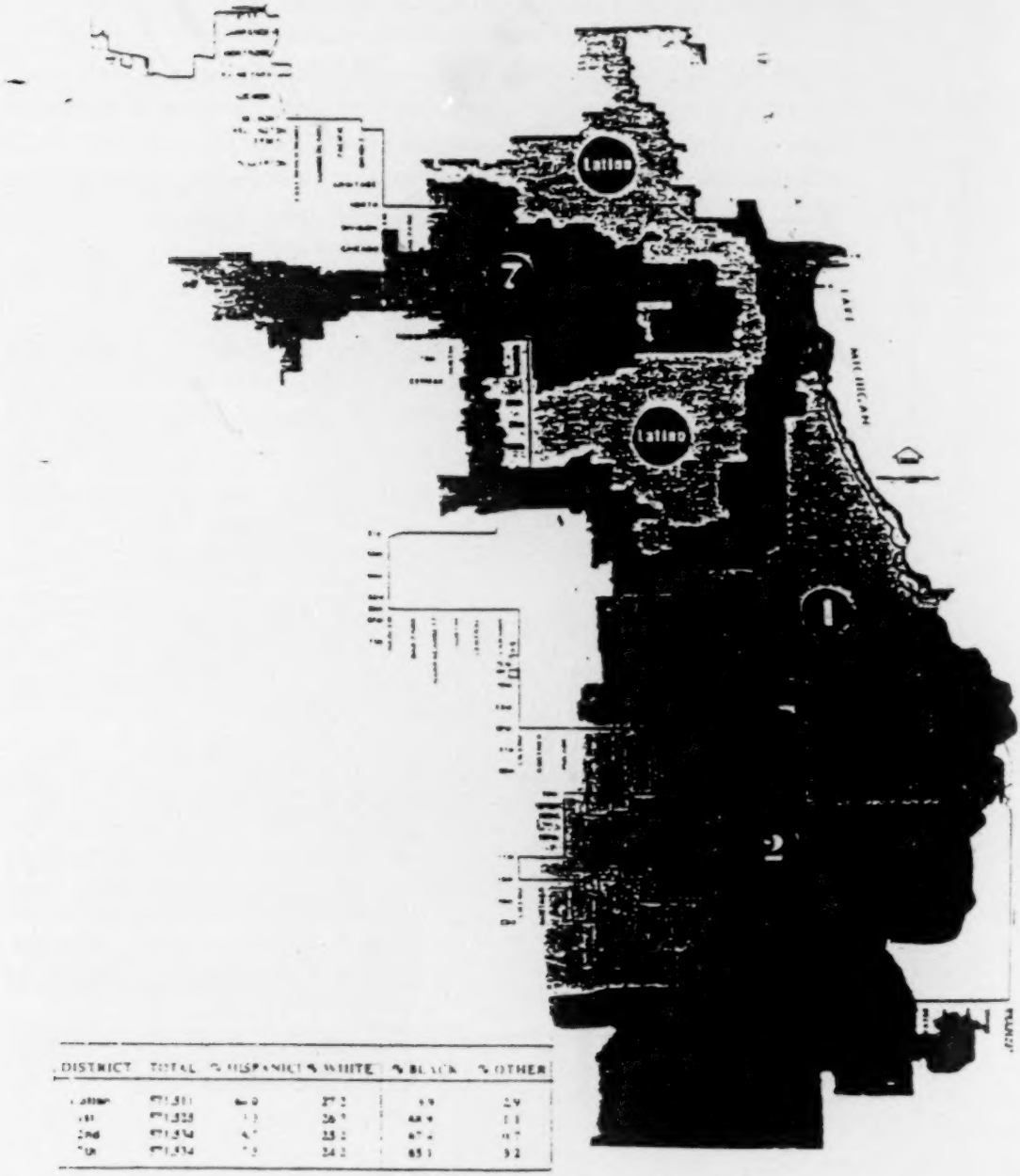

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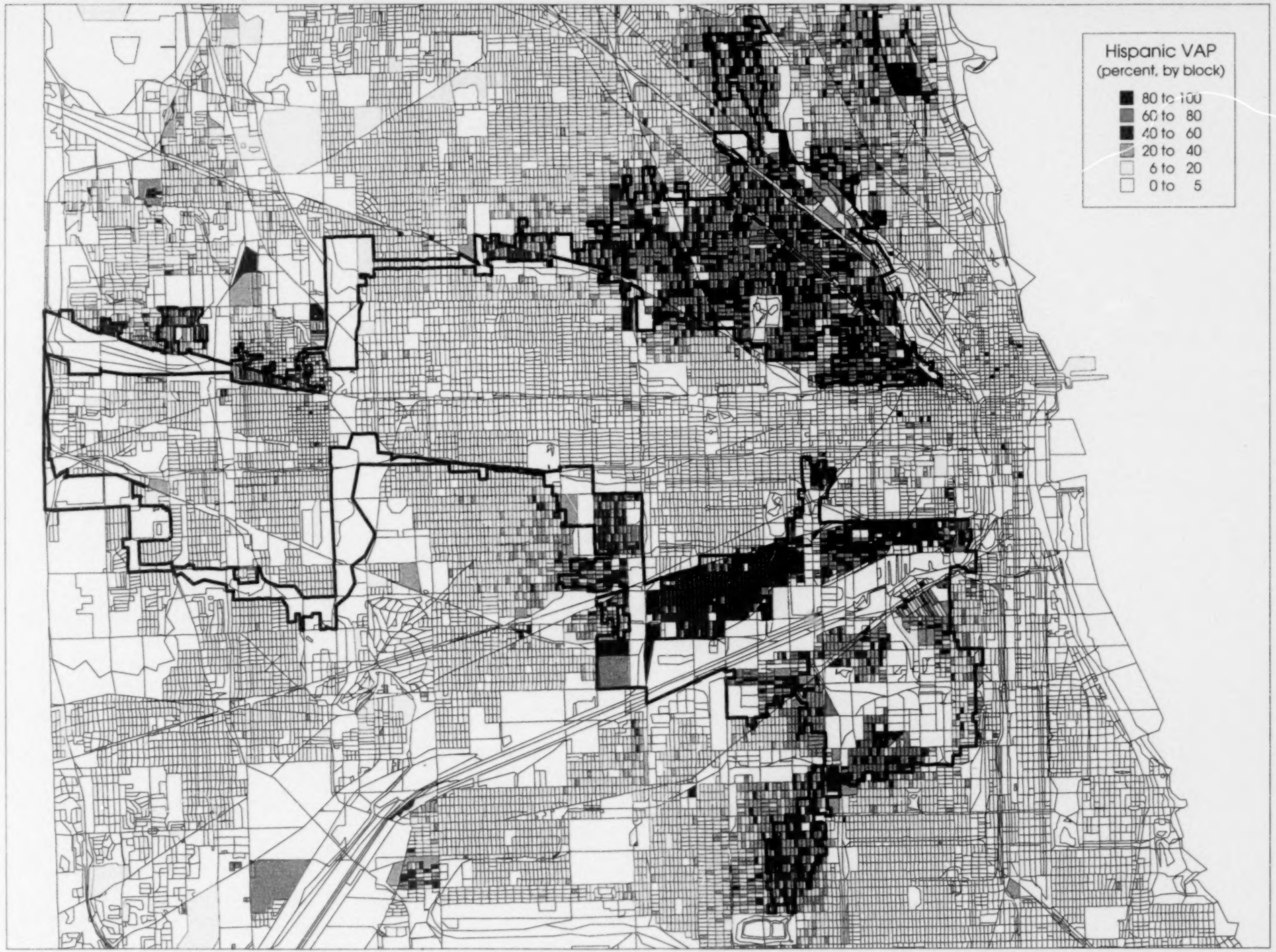
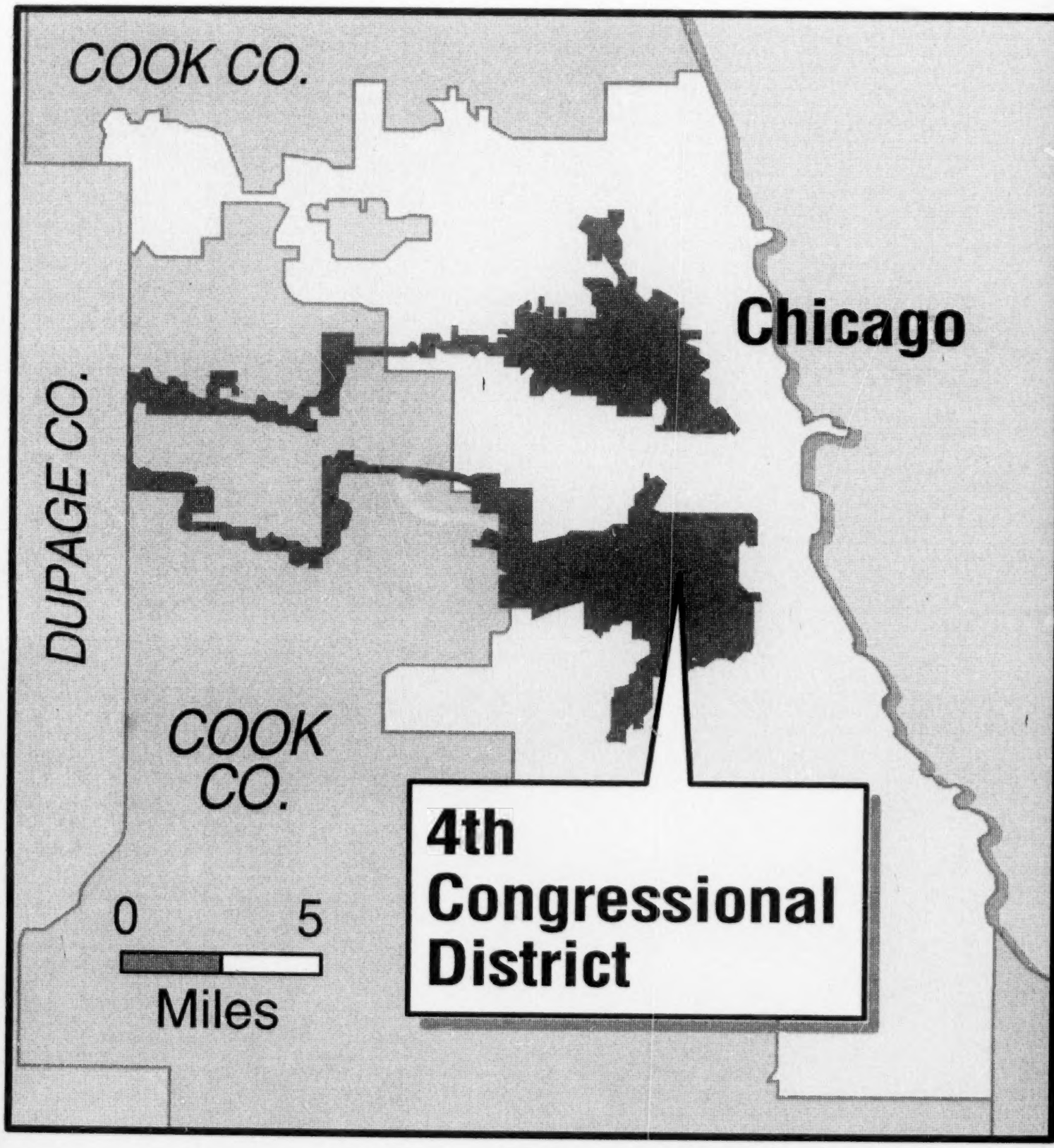


Plaintiff's Exhibit 25

Hispanic VAP by Census Block/District 4 Overlay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No. 97-743

In The

Supreme Court of the United States

October Term, 1997

JAMES R. KING,

Appellant,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees,

BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ and THE CHICAGO URBAN LEAGUE,

Defendant-Intervenors.

On Appeal From The United States District Court For The Northern District Of Illinois

DEFENDANT-INTERVENORS' MOTION TO AFFIRM

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MOTION TO AFFIRM

Defendant-Intervenors hereby move to affirm the judgment sought to be reviewed on the ground that it is evident that the questions raised by appellant in his Jurisdictional Statement are so unsubstantial as not to need any further argument. The decision entered on the merits below is based on law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Appellant's statement of the case contains misstatements and incomplete recitations of the underlying facts. As a result, the statement of the case requires clarification.

This case involves a challenge to a 1991 court-ordered remedial plan which was designed to remedy proven past and present discrimination against Hispanics in and around the City of Chicago.[1] The plan at issue was created by a three-judge panel sitting in the case of *Hastert v. State Board of Elections*, 777 F. Supp. 634, 637 (N.D. Ill. 1991). The *Hastert* court preserved three existing African American majority districts and created the first Hispanic majority congressional district (the Fourth Congressional District) in Illinois thereby affording a majority of the 545,852 Hispanics in Chicago the ability to elect a congressional candidate of their choice for the very first time.

Following this Court's pronouncement in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) *(Shaw I)*, the plaintiff in this action filed a lawsuit under the Equal Protection Clause of the Fourteenth Amendment challenging the constitutionality of District Four. Plaintiff

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[1] The terms "Hispanic" and "Latino" are used interchangeably throughout this motion.

King alleged that the court-ordered plan was drawn predominately on the basis of race and without compelling justification. After a trial, on March 6, 1996, the three-judge district court issued an opinion and order holding that the 1991 court-ordered Fourth Congressional District passed constitutional muster. In so holding, the three-judge court applied this Court's rulings in *Shaw I* and *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995), and found that: (1) District Four was "bizarrely" shaped; (2) racial considerations predominated in the drafting of the district; (3) the *Hastert* court properly found the existence of the *Gingles* preconditions in determining a violation of Section 2; (4) the existence of the *Gingles* preconditions remained in effect at the time of trial; (5) remedying a Section 2 violation is a compelling state interest; and (6) the court-ordered Fourth Congressional District is narrowly tailored.

Subsequently, this Court decided *Shaw v. Hunt*, 517 U.S. ___, 116 S. Ct. 1894 (1996)*(Shaw II)* and *Bush v. Vera*, 517 U.S. ___, 116 S. Ct. 1941 (1996). Plaintiff King appealed the lower court's March 6, 1996 decision to this Court. Defendant-intervenor, the United States, asked this Court to vacate and remand for further consideration in light of the *Shaw II* and *Bush* decisions. While so doing, the United States was clear in its belief that the lower court arrived at the proper decision in upholding the constitutionality of the district. On November 12, 1996 this Court issued an order to vacate and remand "for further consideration in light of *Shaw v. Hunt*, 517 U.S. ___ (1996) and *Bush v. Vera*, 517 U.S. ___ (1996)."

On August 1, 1997, the lower court, upon further consideration of this case in light of the *Shaw II* and *Bush* decisions, re-affirmed its March 6, 1996 opinion. Plaintiff King appealed the lower court's August 1, 1997 decision to this Court.

A. The Fourth Congressional District.

As of 1991, District Four had a population of 571,530 persons. Hispanics account for 65% of the total population and 59% of the voting age population. Over 95% of the population of District Four is located in two core areas, on the northside and southside of the district. J.S. App. at 44, n.49. The remaining 4.7% of the total population is located in the "western connector" which wraps around the African American majority Seventh Congressional District. *Id.* The "western connector" was the result of an effort to avoid clear retrogression in the African American majority districts, thereby preserving the three existing African American districts mandated by the Voting Rights Act. *See, Hastert,* 777 F. Supp. at 650.

The "western connector" contains primarily vacant and unpopulated land. J.S. App. at 44, n.49. District Four is the geographically smallest of any of the 1991 Illinois congressional districts, J.S. App. at 101, it measures only 16 miles in width and 14 miles in length. D.I. App. at 1.[2]

B. The *Hastert* Decision.

In order to properly understand the insufficiency of the issues raised in King's Jurisdictional Statement, it is important to recount the history of the *Hastert* decision, which formed the basis for the *King* court's decision upholding District Four.

The three-judge panel in *Hastert* was convened after the legislature of the State of Illinois failed to pass a reapportionment plan following the release of the 1990 census. The 1990 census revealed that the State of Illinois had lost two of its twenty-two seats in the House of Representatives. *Hastert v. State Board of Elections,* 777 F. Supp. 634, 637 (N.D. Ill. 1991). As a result, lawsuits were filed in federal court seeking to declare the then-current

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[2] Hereinafter "D.I. App. at ___" refers to the Appendix to Defendant-Intervenors' Motion to Affirm filed herewith.

reapportionment plan, which was based on 1980 census data, to be unconstitutional and in violation of Section 2 of the Voting Rights Act. *Id.*

During a two day trial, the *Hastert* court ordered that the parties "submit their evidence in the form of affidavits and depositions, supplemented by any maps and statistical data . . . ." *Hastert*, 777 F. Supp. at 639-40. Each party was able to submit one proposed reapportionment plan to the court for consideration. As part of this process, the parties were able to reach stipulations on a number of factual matters including a stipulation that "the population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." The parties also ultimately submitted two proposed Hispanic majority configurations for the court's review.

Although the parties stipulated to the creation of an Hispanic majority district, the *Hastert* court nonetheless undertook a thorough review of the evidence to determine whether the proposed plans were a legal remedy to a Section 2 violation. *Hastert*, 777 F. Supp. at 640. The proposed plans submitted by the parties were almost identical with respect to the proposed majority Hispanic district: two dense Hispanic population concentration areas in the City of Chicago located north and south were linked together via a western connector that was substantially unpopulated. *Hastert*, 777 F. Supp. at 646. The *Hastert* court assessed the proposed plans both under federal constitutional standards and Section 2 of the Voting Rights Act. *Id.* at 640.

1. The *Hastert* Court's Section 2 Determination.

Applying the three preconditions articulated in *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766 (1986), the three-judge panel of the *Hastert* court reviewed the evidence submitted in the case and made a

number of factual determinations. The *Hastert* court concluded that the Hispanic community was sufficiently large and geographically compact to constitute a majority in a single district. *Hastert*, 777 F. Supp. at 649. The 1990 census figures revealed that the Hispanic population in the City of Chicago increased by 29% to 545,852 and the Hispanic population in Cook County increased by 39% to 694,194. The court found that the Hispanic population in Chicago is located in two "highly concentrated" enclaves between which runs the Seventh Congressional District, an African American majority district. *Id.* at 648-49.

The court determined that the two enclaves of Hispanic population did not indicate separate communities, but they "appear[ed] to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. These exogenous barriers include an expressway as well as "expanses of land developed by the University of Illinois-Chicago Circle and various other medical institutions" which cut through the two Hispanic enclaves. *Hastert*, 777 F. Supp. at 648-49. Furthermore, the two enclaves were approximately one mile apart at their closest point. *Id.*, *see also* D.I. App. at 1.

The *Hastert* court ruled that the Hispanic community is politically cohesive. *Hastert*, 777 F. Supp. at 650. Although the court did note that prior judicial decisions found that the Hispanic community was politically cohesive, the court did not base its conclusion solely on this fact.[3] The *Hastert* court had before it affidavits from

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[3] King erroneously asserts that the *Hastert* court relied solely on prior judicial decisions to support its findings of past discrimination against Hispanics. J.S. at 20. King ignores the true relevant facts. On the issue of the *Gingles* preconditions, the *Hastert* court relied upon the evidence submitted at trial which consisted of ecological regression statistical data demonstrating white bloc voting and Hispanic cohesion. *Hastert*, 777 F. Supp. at 650. In further support, the court noted a history of Hispanic vote dilution in Chicago as set out in prior judicial decisions. *Id.*

members of the Hispanic community in Chicago and a sociologist describing actual shared interests among the Hispanic community in Chicago. *Hastert*, 777 F. Supp. at 649.

The court also reviewed statistical evidence of racial bloc voting patterns in Chicago and determined that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." *Id.* at 650. Lastly, the court found that the history of past and present discrimination against the Hispanic community in Chicago had an attendant impact on effective political participation and representation. *Id.*

2. The *Hastert* Court's Constitutional Analysis.

The *Hastert* court found that the proposed plans adhered to the "one person, one vote" principle. *Hastert*, 777 F. Supp. at 644. The plans were also evaluated to determine whether either had the discriminatory effect of diluting minority voting strength. *Id.* at 645. The *Hastert* court also examined the partisan political fairness of the proposed plans. The court found that the plan was "politically fair." *Id.* at 659.

The *Hastert* court considered the shape of the district in determining whether Section 2 of the Voting Rights Act required as a remedial measure the creation of District Four. The *Hastert* court remarked that because the proposed Hispanic district was an "extraordinary configuration," the court would not agree to the remedial measure without carefully scrutinizing the proposed district. *Hastert*, 777 F. Supp. at 648.

And in the *King* trial, there was clear statistical evidence of vote dilution in the Hispanic community. J.S. App. at 51-52. Moreover, because King declined to put on any evidence below concerning the *Hastert* "totality of the circumstances" findings, he can argue no error on this point. *Id.* at 53.

In scrutinizing the district, the *Hastert* court determined that District Four's shape was necessary to counteract the effects of white bloc voting and was required to remedy the vote dilution of Hispanics in the affected area while also protecting the three African American majority districts against vote dilution. *Id.* at 662.

C. The *King* Court's Decision.

On December 13-15, 1995 a three day trial was held on this matter. As a preliminary matter, the *King* court recognized that the case was in a unique posture since it was a challenge to the determination made by a three-judge panel in the *Hastert* case, and determined that it would take judicial notice of the findings of fact of the *Hastert* court.[4]

At trial, the parties presented evidence that had been previously admitted in the *Hastert* litigation. The parties put on witnesses that addressed the three *Gingles* preconditions, including statistical data on voting patterns in the City of Chicago up to and including elections in 1995. All parties were able to fully argue and brief their respective positions to the court. After trial, on March 15, 1996, the three-judge panel issued a written decision upholding the constitutionality of District Four.

1. The *King* Court's Application of Strict Scrutiny to the *Hastert* Court's Plan.

In applying this Court's rulings in *Shaw* and *Miller*, the *King* court subjected the *Hastert* court's Fourth Congressional District to strict scrutiny. J.S. App. at 30-37. The court further ruled that the *Hastert* evidence was conditionally admitted at trial for purposes of showing

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[4] Consistent with Seventh Circuit precedent, the lower court ruled that due to the unique nature of the case and the need to expedite matters for trial, judicial notice of the *Hastert* findings would be taken. *See, Philips Medical Sys. Int'l B.V. v. Bruetman*, 982 F.2d 211, 215 n.2 (7th Cir. 1992).

what evidence was relied upon by the *Hastert* court. J.S. App. at 7-16. In deciding to take judicial notice of the *Hastert* findings, the *King* court stated that it would adopt those findings as conclusive unless King showed that the *Hastert* court erred, by law or otherwise, in making the specific findings or that changed circumstances existed since November 1991 such that the findings of the *Hastert* court were no longer valid. J.S. App. at 16. The *King* court ruled that plaintiff King must establish changed circumstances by a preponderance of the evidence. *Id.* If changed circumstances were established, the *King* court would then analyze the evidence *de novo*. *Id.* King failed to demonstrate legal error or changed circumstances.

a. The *King* Court's Analysis of the *Hastert* Court's Section 2 Findings.

The *King* court determined that the *Hastert* court properly found that the Hispanic community was sufficiently large and geographically compact under the first prong of *Gingles* and that plaintiff King failed to rebut this finding by competent evidence. The court rejected plaintiff's argument that the Hispanic community in Chicago lacked political cohesion because it consists of Mexican-American and Puerto Rican residents. The only evidence plaintiff King submitted was anecdotal evidence which the *King* court found was "incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw." J.S. App. at 50.

King argued at trial that changed circumstances existed with respect to the *Hastert* court's findings of racial bloc voting. The *King* court rejected this argument because it was not supported by the recent citywide elections or any meaningful statistical analysis. J.S. App. at 51-52. Instead the court credited Professor Allan Lichtman's ecological regression and extreme case analysis of forty-one elections held between 1983 and 1995. Professor

Lichtman's analysis established a "definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *Id.*

Lastly, at trial King argued that District Four was not sufficiently compact to create a remedial district. In support of this argument King offered evidence that the district has many sides and is not visually appealing. The court rejected this argument. The court found that the evidence from the *Hastert* case and the evidence taken at trial in this case, confirmed that the Hispanic community in Chicago was geographically compact as required by *Gingles*. J.S. App. at 52-53.

The *King* court concluded its review of the *Hastert* Section 2 findings as follows:

> [T]he *Hastert* court had a strong basis for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the *Hastert* court cited with approval prior judicial determinations that found a definite and continuing pattern and practice of electoral discrimination against the Hispanic community in the City of Chicago and the State of Illinois. The *Hastert* court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of Hispanic elected officials at the city and state-levels and more subtly in the social and economic discrimination that adversely affected effective political participation and representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past discrimination against Hispanics.

J.S. App. at 54-55 (footnote omitted).

After finding that the *Hastert* court's adoption of District Four was an appropriate remedy to a finding of

vote dilution under Section 2, the *King* court then addressed the issue of narrow tailoring.

D. The *Hastert* and *King* Courts' Finding of Narrow Tailoring.

In *Hastert*, the court subjected the two proposed plans to an exacting constitutional review. *Hastert*, 777 F. Supp. 640-62. In so doing, the court noted that District Four was narrowly tailored to include those Hispanics who suffer from vote dilution. *Hastert*, 777 F. Supp. at 650. Further, the court stated that District Four contained the number of Hispanic residents that was minimally necessary to ensure a reasonable opportunity to exercise effective political participation. *Hastert*, 777 F. Supp. at 655. Moreover, the court determined that the shape of the district was required to preserve the shared interests of Hispanics while also protecting the three African American majority districts from vote dilution. *Id.*

In determining which plan better served the remedial purpose of curing vote dilution, the *Hastert* court evaluated both plans for fairness to the voting rights of the African American and Hispanic racial/ethnic majorities. *Hastert*, 777 F. Supp. at 645. Because three African American majority districts already existed prior to the litigation, the *Hastert* court was concerned that any new remedial plan not result in "retrogression" of the ability of African Americans to choose a candidate of choice. *Id.* at 647. Because it had been established that a 65% majority of African Americans in a district was required to provide a meaningful opportunity to elect a candidate, *see Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), the court reviewed the proposed plans in order to determine whether any remedial measure afforded the Hispanics would impermissibly dilute African American voting strength. *Hastert*, 777 F. Supp. 647-48.

The *Hastert* court adopted a remedial plan which accomplished both objectives in the least intrusive manner. The plan created a new Hispanic majority district with 65% total population and maintained three African American districts with at least 65% total population. The court also scrutinized the proposed remedial plans and determined that the plan that was subsequently adopted best served the interest of fairness to both Democrats and Republicans. *Hastert*, 777 F. Supp. at 655-59. In fact, the court noted that the creation of an Hispanic majority district and the maintenance of three African American majority districts had bipartisan support. *Id.* at 646 n.19.

The *King* court, rejecting plaintiff King's arguments to the contrary, found that there exists a strong basis in the evidence for a finding that the *Gingles* preconditions were met, J.S. App. at 54-55; 65, and, under the totality of the circumstances, that District Four was warranted under Section 2. J.S. App. at 54-55. The *King* court also found that the shape of District Four serves to preserve the shared interests of Hispanics while preserving the core of existing districts and recognizing the traditional redistricting principle of incumbency protection. J.S. App. at 70-71 n.4.

Ultimately, the *King* court held that the *Hastert* court had scrutinized the constitutionality of District Four and had properly determined that the district was an appropriate remedy to cure a Section 2 violation. J.S. App. at 57; 72-73. The *King* court did note that the adopted plan "includes virtually all areas of high Hispanic concentration on the northern . . . part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago," J.S. App. at 43 (internal citations omitted), with the "western connector" making up only 4.7% of the total population of the district and 3.1% of the district's Hispanic population. J.S. App. at 44 n.49. The court concluded that the plan was "properly proportioned to the nature of the violation" and was "narrowly tailored," J.S. App. at 57, in

that "its consideration of race (reflected by its noncompactness and irregularity) is no more than reasonably necessary to fulfill its remedial purpose." J.S. App. at 72-73.

ARGUMENT

In an effort to remedy proven past and present electoral discrimination in voting rights against Hispanics in Chicago and to avoid similar discrimination against African American voters, the lower court in this case allowed a 1991 court-ordered remedial plan to stand against a constitutional challenge. In following this Court's precedent, the *King* court determined, upon a thorough review of all the evidence, that the application of strict scrutiny to the 1991 remedial plan was indeed not "fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 2117 (1995). The judgment below should be affirmed.

I. THE DISTRICT COURT CORRECTLY FOUND THAT CREATION OF A MAJORITY HISPANIC DISTRICT WAS REQUIRED TO SERVE THE COMPELLING GOVERNMENTAL INTEREST OF COMPLYING WITH SECTION 2 OF THE VOTING RIGHTS ACT.

There is a compelling governmental interest in complying with Section 2 of the Voting Rights Act so as to assure that a state's redistricting plan does not dilute minority voting strength. *Bush v. Vera*, ___ U.S. ___, 116 S. Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring); *id.* at 1975, 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1998, 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). As Justice O'Connor observed in *Bush*, 116 S. Ct. at 1969-1970:

> [W]here voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of

> the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present – viz., (i) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. at 50-51.

The three-judge court in this case concluded that all three of the *Gingles* factors were present, and that a majority Hispanic district was necessary to comply with Section 2. Those findings are supported by substantial evidence, are not clearly erroneous, and present no issue warranting further review by this Court.

First, both the *Hastert* Court in 1991, and the court below in 1996 and 1997, found that the Hispanic population of Chicago was sufficiently large and geographically compact to constitute a majority in a single-member district. *Hastert*, 777 F. Supp. at 649; J.S. App. at 52-53. As both courts acknowledge, the Hispanic population in Chicago had grown to 545,852 by 1990; most of this population is clustered in two dense enclaves that are approximately a mile apart at their closest point and this small separation does not reflect the existence of two distinct communities, but merely the presence of a highway and institutional campuses that lie between the two enclaves. *Id.*, citing *Hastert*, 777 F. Supp. at 649.

King argues that the Hispanic population is insufficiently compact under *Gingles* because District Four is not itself compact. J.S. at 14-15. Even assuming that the "western connector" of District Four indeed renders the district noncompact – an incorrect assumption, as demonstrated below – King's argument is nevertheless in error. "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Bush*, 116 S. Ct. at 1971 (Kennedy, J.,

concurring); *see also id.* at 1970 (O'Connor, J., concurring) (noting that, despite noncompactness of challenged District 30 in Dallas County, other potential district configurations showed requisite geographical compactness of minority population).[5] Thus, because the Hispanic population itself is geographically compact, the requisite showing under the first prong of *Gingles* is not defeated merely because the challenged district departs to some extent – here, to a very small extent – from the configuration that would *maximize* the district's compactness.

King also argues that a finding under the first prong of *Gingles* is barred as a matter of law absent proof that Hispanics constitute more than 50% of the citizen voting-age population (CVAP) of the challenged district. J.S. at 15-16. This argument presents no significant issue for review. Hispanics make up 65% of the district's total population and 59% of its voting-age population, and the district actually elected an Hispanic candidate in both 1992 and 1994. The purpose of the first prong of the *Gingles* requirement is to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice," *Gingles*, 478 U.S. at 50 n.17 (emphasis in original), and that potential clearly has been realized by District Four. *Cf. Bush v. Vera*, 116 S. Ct. at 1970 (noting that proof satisfied *Gingles* factors in Dallas County, Texas where reasonably compact plans with 44% or 45.6% African American populations could be drawn).

Further, even assuming that a district with less than a 50% Hispanic CVAP could never satisfy the first prong of the *Gingles* requirement,[6] this does not mandate review of

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[5] As several maps in the record indicate, a hypothetical majority Hispanic district can be drawn using regular and reasonably compact shapes, including through the use of a "middle connector." *See* D.I. App. at 2-3.

[6] For numerous reasons, it would be improper to require proof of a majority Hispanic CVAP before a majority Hispanic

this case by this Court. The lower court specifically found that King's assertion that Hispanics make up 45% of the CVAP in District Four is only an estimate. J.S. App. at 50 n.58. The district court properly declined to adopt this estimate as definitive because it reflected several flaws and omissions, most of which King ignores in his jurisdictional statement.[7]

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district could be drawn. For one thing, the Census Bureau does not release citizenship estimates when it releases the results of the census enumeration, and such information is simply unavailable at the time when states must conduct decennial redistricting early in the decade. *See also Wilson v. Eu*, 1 Cal. 4th 707, 750-51 (1992) (rejecting requirement of CVAP majority as basis for assessing the first prong of *Gingles*); *LULAC v. North East Independent School District*, 903 F. Supp. 1071, 1083-84 (W.D. Tex. 1995) (same). Further, the data the Census releases for redistricting purposes is from a full-count enumeration while the citizenship data derives from a sample count of the population. J.S. App. at 50 n.58. This sample-count citizenship data is released at the block-group level while the full-count data is released at the smaller, and more precise, block level. *Id.* Consequently, the citizenship sample-count data is subject to sampling error. *Id.* However, the issue need not be resolved here, because there is no substantial factual dispute that Hispanic residents are sufficiently numerous to elect a candidate of choice in District Four.

[7] King's estimate was flawed in part because it failed to properly account for split Census block groups; because the Census data involved is not based on an enumeration, but instead on sampling techniques that are subject to sample errors; and because it did not overcome defendant-intervenors' evidence that naturalization and an INS amnesty program had increased the number of Hispanic citizens in the district. J.S. App. at 50 n.58. Further, it is immaterial that the district court in one passage may have characterized plaintiff's 45% estimate as an estimate of the percentage of adult Hispanics who were citizens, rather than the percentage of the adult citizen Hispanics in the district. The court correctly recognized that there was simply no "competent evidence that the Hispanic

King next argues that the lower court's and the *Hastert* court's finding of the existence of racial bloc voting is in error. J.S. at 16-19. Ignoring the findings made on each of the three *Gingles* factors, King asserts that the lower court failed to determine whether the white majority voted as a bloc to usually defeat Hispanics' candidates of choice. J.S. at 17. This argument is without basis.

Substantial evidence supports the district court's conclusion of legally significant racially polarized voting in Chicago. The *King* court credited Dr. Allan Lichtman's ecological regression and extreme case analysis of forty-one elections held between 1983 and 1995. J.S. App. at 51-52. The evidence showed that Hispanics in Chicago consistently support Hispanic candidates and that the statistical results "establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *Id.* As a result of this bloc voting, no Hispanic candidate has ever been slated or elected to Congress, the state legislature, or the Chicago City Council except from majority Hispanic VAP districts, and only one Hispanic candidate has ever won a citywide election.[8] J.S. App. at 52.

King attempts to minimize this evidence by mischaracterizing the record established below. King erroneously asserts that only three of the 41 elections relied upon by the court showed the existence of white bloc voting. J.S. 17. This is incorrect. As the lower court found, Dr. Lichtman's analysis established that Hispanic candidates of choice have not been able to win in districts lacking a Hispanic VAP majority. Thus, of the 22 elections cited by King where the Hispanic candidate won, 19 were

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citizen voting age population falls below fifty percent." J.S. App. 50.

[8] King's own expert on racial bloc voting analysis conceded at trial that he could not identify any Hispanic candidate who won an election to a single member district in a majority white VAP district. D.I. App. at 7.

in districts with a Hispanic VAP majority.[9] In the absence of such a majority, Hispanic candidates of choice are defeated by white bloc voting. J.S. App. at 51-52.

Since Hispanic victories have come almost exclusively in Hispanic majority districts, the district court was correct in concluding that a majority Hispanic district was necessary to avoid dilution of Hispanic voting strength. This evidence and other substantial evidence fully supported the district court's findings that the second and third *Gingles* factors were present. *Cf. Bush v. Vera*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (noting that racially polarized voting in Dallas County was properly demonstrated by similar evidence).

The lower court carefully reviewed the evidence on each of the three *Gingles* factors, considering not only the *Hastert* courts findings, but additional evidence put on by the parties at the 1995 trial, and found that the evidence demonstrated the existence of each factor. J.S. App. at 47-53; *id.* at 55-56 ("The *Hastert* court adopted the Fourth Congressional District to remedy a proven Section 2 violation. The injuries resulting from the dilution of the Hispanic voting power were clear and present").[10] These

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[9] In the three instances Hispanics have won in other districts, they have won as the result of the effects of party ticket inclusion (Miriam Santos for city treasurer in 1991 slated with incumbent mayor Daley, and later as an incumbent in 1995) or because of a splitting of the vote for a field of white candidates (Judges Cerda and Reyna). J.S. App. at 51.

[10] As the court below noted, the *Hastert* record included findings on additional factors supportive of a Section 2 claim under the totality of circumstances. King now asserts that the evidence on the presence of the "*Zimmer* factors" was insufficient. J.S. at ~~19~~-20. It is important to note that King declined, during the proceedings below, to challenge this evidence or put on further evidence concerning such factors. J.S. App. at 53. Thus, King has not demonstrated that the findings established in the *Hastert* record on the "totality of the circumstances" are in error.

are precisely the findings contemplated under this Court's decisions as a predicate for drawing a majority-minority district. *Bush v. Vera*, 116 S. Ct. at 1961 (noting that the three *Gingles* factors are "the threshold conditions for § 2 liability" that must be assessed under the strict scrutiny test) (plurality opinion) (citations omitted); *id.* at 1970 (O'Connor, J., concurring). Furthermore, the district court's factual findings on these issues cannot be disturbed unless they constitute clear error under Rule 52. *See, Thornburg v. Gingles*. King's arguments do not remotely suffice to meet this standard.

Plaintiff's citation of *Voinovich v. Quilter*, 507 U.S. 146, 156, 113 S. Ct. 1149 (1993), as imposing a more onerous burden for court-ordered majority-minority districts, is inapposite. In *Voinovich*, the federal court had improperly struck down a legislative redistricting plan crafted by the Ohio legislature, without proper proof of a Section 2 violation. Here, the federal court's role in crafting the 1991 redistricting plan was different because the Illinois legislature had failed to enact any redistricting plan and the *Hastert* court therefore was *required* to assume that "unwelcome obligation." *Connor v. Finch*, 431 U.S. 407, 415, 97 S. Ct. 1828 (1977). Under such circumstances, as both the *Hastert* court and the court below properly recognized, it was entirely proper for the *Hastert* court to create a majority Hispanic district to avoid unlawful dilution of Hispanic voting strength under Section 2 of the Voting Rights Act.

II. THE *HASTERT* COURT'S REMEDIAL PLAN IS NARROWLY TAILORED TO SERVE THE COMPELLING STATE INTEREST OF COMPLYING WITH THE VOTING RIGHTS ACT.

This Court has held that a district survives strict scrutiny if there is a "strong basis in evidence" to show that a majority-minority district is reasonably necessary to comply with Section 2 and that it "substantially addresses the § 2 violation." *Bush v. Vera*, 116 S. Ct. 1941,

1960 (1996) (plurality opinion) (internal citations omitted). Further, this Court has rejected as "impossibly stringent" the view that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Id.* (internal citations omitted). The record below fully supports the lower court's findings that District Four is narrowly tailored and meets strict scrutiny.

In creating this remedial district, the *Hastert* court narrowly tailored the district to include the specific geographically compact Hispanic population found to be discriminated against through vote dilution. *Cf. Shaw v. Hunt*. The court below also found that the district does not depart dramatically from Illinois' traditional redistricting principles. These factual findings which are, of course, entitled to deference, fully support the lower court's unanimous conclusion that District Four is narrowly tailored.

A. The Fourth Congressional District Does Not Disregard Illinois' Traditional Redistricting Principles.

District Four does not reflect a "substantial disregard" for Illinois' redistricting principles. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring). King asserts that political subdivisions were split excessively in the crafting of District Four. J.S. at 7-9. The evidence at trial did not support this assertion. The lower court found that "[t]he data permits the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions," *id.*, and further found that "[w]hile uncertain, this conclusion offers support that the Fourth District is 'reasonably compact' when viewed in comparison to other Illinois congressional districts and therefore should not be disregarded." J.S. App. at 72 n.5. Except for his argument concerning the precinct lines, King does not dispute the evidence in the record that

other congressional districts split a comparable or greater number of political subdivisions as does District Four. J.S. at 7.

In an attempt to demonstrate error, King relies exclusively on the assertion that election precincts were unduly split in the configuration of District Four. J.S. at 15. This argument is without merit. In Illinois, all precinct boundaries are reconfigured following the completion of congressional reapportionment. *10 ILCS 5/11-3*, J.S. App. at 79-80. Although precinct lines may have been split under District Four when it was ordered to be implemented by the *Hastert* court in 1991, Illinois law mandated that the precinct lines were to be realigned thereafter.

Because the precinct lines were not immediately realigned by the Chicago Board of Election Commissioners (CBEC) due to time constraints, *see*, Sawicki Aff., J.S. App. 110 at ¶ 9-10, the 1992 primary election was held under the old lines. As a result of this administrative inaction, some problems did arise of the nature complained of by King, but only for the 1992 primary election, a fact King fails to acknowledge in his jurisdictional statement. Nonetheless, the precinct lines were subsequently realigned in the summer of 1992, as required by state statute, resulting in far less split precincts. *Id.* at ¶ 10.[11]

Just because one election was held under the old precinct boundaries due to administrative inability, does not invalidate District Four. Especially in light of the fact that in Illinois, traditional redistricting principles do not include reliance on political boundaries for redistricting. *See, Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1099 (N.D. Ill. 1982) (three-judge court) (court would not

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[11] This realignment of the precinct lines would have effectively eliminated any ballot secrecy concerns. State law provides that upon realignment the CBEC should create precincts which contain "as nearly as may be practicable, 500 voters. . . . " *10 ILCS 5/11-2*, J.S. App. 76-78.

strike down the challenged plan "merely because it fractures a number of political subdivision lines or creates districts that overlap between Chicago and its surrounding suburbs"); *see also, Lawyer v. Dept. of Justice*, 117 S. Ct. 2186, 2195 (1997) (splitting political subdivisions does not violate constitutional compactness standards when such treatment is common practice in state legislative districts). And it is clear that respect for political subdivisions does not correspond to respect for communities of interest in Illinois. As the Illinois Supreme Court has stated, "boundary lines of villages, townships, counties and cities do not necessarily reveal communities of interests." *People of the State of Illinois ex rel. Burris v. Ryan*, 147 Ill.2d 270, 282 (Ill. 1991) (Heiple, concurring), *aff'd after remand*, 147 Ill.2d 270 (1992), *cert. denied*, 504 U.S. 973 (1992).

King has failed to demonstrate any error in the lower court's determination that District Four did not excessively split political subdivisions.

B. The Shape of the Fourth Congressional District is Reasonably Compact to Remedy a Finding of Vote Dilution.

District Four is comprised predominately of two densely Hispanic populated neighborhoods which are less than one mile apart and are separated by exogenous barriers. *Hastert*, 777 F. Supp. at 648-49. The district is only 14 miles wide from its western most point to its eastern most point. D.I. App. at 1. It is only 16 miles long, from north to south. *Id.* All of the district is within Cook County (D.I. App. at 6), and a vast majority of the district is within the City of Chicago. D.I. App. at 6.[12]

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[12] Here, the record establishes that the Fourth Congressional District is relatively small in size and dense in concentration which allows the current congressman for this district to be able to communicate and effectively represent the

The record below establishes that District Four was crafted as a remedy to a proven Section 2 vote dilution case. Therefore, the purpose of District Four is on providing a remedy for those Hispanics residing in the areas affected by vote dilution. As this Court has held in *Shaw II*, to be narrowly tailored the remedy must address the violation by including the areas in which minorities are geographically concentrated. *Shaw II*, 116 S. Ct. at 1905-06. In fact, this Court in *Shaw II* struck down the district at issue precisely because it failed to include those voters who had suffered from vote dilution. *Id.* at 1906. In adopting District Four, by contrast, the *Hastert* court narrowly tailored the district to include the specific geographically compact Hispanic population found to be discriminated against through vote dilution.[13]

In arguing that narrow tailoring is defeated due to the shape of the district, King misreads this Court's decision in *Bush*. This Court in *Bush* determined that district shape is relevant to the narrow tailoring inquiry only to the extent that the shapes of districts "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial." *Bush*, 116 S. Ct. at 1962. However, this Court also recognized that a legislature, or a court, in an attempt to remedy a Section 2 violation may impose a race-based remedy so long as "the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 1961. The portion of the district that King argues gives it a noncompact visual appearance, the "western connector," contains only 4.7%

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residents within all of the district with no difficulty. D.I. App. at 4.

[13] King asserts that the "western connector" sought to include "the highest percentages of Hispanic population." J.S. at 10. However, this "connector" is comprised mostly of unpopulated areas. J.S. App. at 44 n.49.

of the overall population of the Fourth Congressional District. J.S. at 44 n.49.[14] This means that all but a small fraction of the population resides within the compact area that essentially coincides with a "hypothetical court-drawn district," (*Bush*, 116 S. Ct. at 1970) (O'Connor, J., concurring), that satisfies the first prong of *Gingles*. *Compare Shaw II*, 116 S. Ct. at 1907 (only 20% of the challenged district coincided with the area where blacks were alleged to be geographically concentrated and thus 80% of the district did not coincide with the area of compact minority population).

Also, use of the "western connector" to join the two Hispanic enclaves of population does not indicate that the Hispanic population itself was not geographically compact, as suggested by King. J.S. at 11. As the *Hastert* court determined, the two enclaves of Hispanic population did not indicate separate communities, but they "appear[ed] to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. This finding is not disputed by King.

Moreover, the "western connector" was used to preserve the shared interests of Hispanics while also protecting the three African American majority districts from vote dilution. *Hastert*, 777 F. Supp. at 655. Here, the evidence at trial provides a basis for a finding that District Four is reasonably compact while maintaining the

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[14] When only 4.7% of the population of a district lies within the area that gives rise to a noncompact visual appearance, such a *de minimis* impact should not invalidate the district. *Cf. White v. Regester*, 412 U.S. 755, 764 (1973) (maximum total deviation of 9.9% from ideal district population held insufficient to make out a *prima facie* case of one-person, one-vote violation under Fourteenth Amendment); *Gaffney v. Cummings*, 412 U.S. 735, 750-51, 93 S. Ct. 2321 (1973) (maximum total population deviation of 8% insufficient to make out a *prima facie* case under Fourteenth Amendment).

three African American historic districts.[15] Had District Four been more rectangular in shape, running north to south, *see*, D.I. App. at 2-3, this more aesthetically pleasing district would have compromised the viability of the Seventh Congressional District and led to African American vote dilution through impermissible retrogression.[16]

In addition, under the plan upheld by the court below, the African American population percentage in the three surrounding districts has already been reduced compared to the districts in place during the 1980's. Under the 1980's congressional plan, the three African American districts had black majorities well over 65% total population. *Hastert*, 777 F. Supp. at 646 n.19. After *Hastert*, those majorities were substantially reduced to just around 65% total population even with the use of the "western connector." Avoiding a violation of Section 2

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[15] The *Hastert* court specifically found that the Fourth Congressional District's shape was dictated by the need to preserve the three existing African American districts which, the court held, was required under the Voting Rights Act. *Hastert*, 777 F. Supp. at 650. As the *King* court noted, in order to provide the three pre-existing African American districts with sufficient population to create effective and constitutional (one-person, one-vote) districts, the shape of the African American districts necessarily affected the boundaries of the Fourth Congressional District and resulted in the "western connector." J.S. App. at 44 n.49. The lower court further found that in the absence of evidence that the three existing African American districts are unconstitutional (King has not challenged the constitutionality of these districts), the preservation of these districts was a valid secondary consideration along with protecting the incumbency of the Seventh Congressional District representative. J.S App. 70-71 n.4.

[16] In a Section 2 context, retrogression of minority-majority districts can lead to unlawful vote dilution. *See, Ketchum v. Byrne*, 740 F.2d at 1406 (holding that retrogression in the number of minority wards can form a basis for a violation under Section 2 of the Voting Rights Act where the number of African American wards decreased from nineteen to seventeen).

with respect to African Americans was a substantial justification for the use of the "western connector" and the resultant minor departure from maximum possible compactness. As a result, the lower court adopted a plan that preserved the voting rights of both the Hispanic and African American voters, at no expense to white voting strength. Therefore, the *King* court correctly concluded that the plan was "properly proportioned to the nature of the violation" and was "narrowly tailored." J.S. App. at 57.

C. The Fourth Congressional District Respects Communities of Interest.

The evidence below illustrates that District Four contains a community with actual shared social and economic interests. J.S. App. at 51-52 n.59.[17] A noted ethnographer and sociologist, Dr. Felix Padilla, testified about the economic and social cohesiveness of the Hispanic residents of District Four. These commonalities

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[17] King's reproduction of the lower court's March 6, 1996 opinion in the Appendix to his Jurisdictional Statement is incomplete. King's appendix omits important language from footnote 59 of the lower court's opinion. For the Court's convenience, the correct language is as follows:

> To the contrary, the factual record is replete with testimony establishing the political and social cohesiveness of the Hispanic community. Senators Jesus Garcia and Miquel Del Valle both testified about the common political concerns of the Mexican-Americans and Puerto-Ricans and their joint efforts to represent the entire Latino community in the Illinois General Assembly. Congressman Luis Gutierrez likewise identifies common political, economic and social concerns that affect both Mexican-Americans and Puerto-Ricans. Dr. Felix Padilla, a respected sociologist and ethnographer, also testified at length about the historical as well as present-day solidarity and cohesiveness of the Chicago Latino community.

included a common history of combatting social and political concerns as a unified group. *Id.* Also, during the trial on the 1991 *Hastert* litigation, persons who were involved in developing District Four as a proposed plan offered evidence to the *Hastert* court which demonstrated that the Hispanic population within District Four had common social and economic concerns. *Id.*

Additional evidence was brought out at trial which showed that Hispanics in District Four shared common socio-economic concerns, while the white, African American and Hispanic populations in Chicago have substantially different socio-economic characteristics in areas of home ownership, income levels, unemployment, education and poverty levels. J.S. App. at 45-46. Importantly, the *King* court noted that the testimony of Dr. D. Garth Taylor demonstrated that the socio-economic characteristics of District Four contrasted greatly with the socio-economic characteristics of the surrounding African American congressional districts. *Id.* Thus, rather than disregarding communities of interest, the *Hastert* remedial plan respects communities of interest. This also provides substantial justification for the creation of District Four.

The *Hastert* court determined that the Hispanic community was geographically compact, politically cohesive and unable to elect candidates of their choice due to white bloc voting. *Hastert*, 777 F. Supp. 649-51. Furthermore, the court crafted a remedy which included the very same population experiencing vote dilution, and limited the district to the minimum number of Hispanic residents generally believed necessary to provide an opportunity to elect a candidate of choice. As this Court has stated "[a] Section 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests'." *Bush v. Vera*, 116 S. Ct. at 1960.

III. IN APPLYING STRICT SCRUTINY TO THE CHALLENGED PLAN, THE DISTRICT COURT PROPERLY DEFERRED TO THE *HASTERT* COURT FINDINGS SUBJECT TO KING DEMONSTRATING ERROR OR CHANGED CIRCUMSTANCES.

King erroneously claims that he should not have been bound by the findings of *Hastert* court. J.S. at 22-26. Because the procedural facts of this case are unique, and in an effort towards judicial economy, the *King* court correctly conditionally admitted the *Hastert* court findings under Federal Rule of Evidence 201.

King asserts that the district court erred in treating this case under Federal Rule of Civil Procedure 60(b) because he was not a party to the *Hastert* litigation. J.S. at 24. This is a non-issue. It is undisputed that King was not a party or in privity to the *Hastert* litigation. However, because the essence of King's lawsuit was essentially an attack on the remedial plan adopted by the *Hastert* court, the lower court appropriately applied a modified version of the Rule 60(b) standard. J.S. App. at 7-12. Moreover, the ultimate issue of whether District Four is justified under a constitutional analysis was reviewed *de novo*. J.S. App. at 16-17.

The lower court's conditional admittance of the *Hastert* court's findings was proper and presents no issue warranting further review. The court did not give those findings conclusive effect; rather, King was given a full opportunity at trial to show that the *Hastert* findings were in error or were no longer valid. The lower court held that it would admit into evidence the findings of fact of the *Hastert* court and would adopt those findings unless King demonstrated (1) that the findings were "clearly erroneous"; or (2) that, by a preponderance of evidence, specific factual circumstances had changed. J.S. App. at 15-16.

King was given a full opportunity to prove his case. He had three trial days to show that the *Hastert* findings were wrong or that changed circumstances existed. At

trial all parties addressed the issues of the *Gingles* preconditions, communities of interest, and traditional redistricting principles. King was not precluded from proving his case in any manner. Rather, he was unable to put forth competent evidence to support his claim. King has not raised a valid issue for review by this Court.

CONCLUSION

King's arguments are completely without merit to warrant any further review from this Court. The Fourth Congressional District is an appropriate remedy to address proven vote dilution. The record in this case clearly supports the lower court's findings that the Fourth Congressional District meets strict scrutiny. For the reasons noted above, this Court should grant Defendant-Intervenors' Motion to Affirm.

Dated: December 30, 1997

Respectfully submitted,

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No. 97-743

In The

Supreme Court of the United States

October Term, 1997

JAMES R. KING,

Appellant,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees,

BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ and THE CHICAGO URBAN LEAGUE,

Defendant-Intervenors.

On Appeal From The United States District Court For The Northern District Of Illinois

APPENDIX TO DEFENDANT-INTERVENORS' MOTION TO AFFIRM

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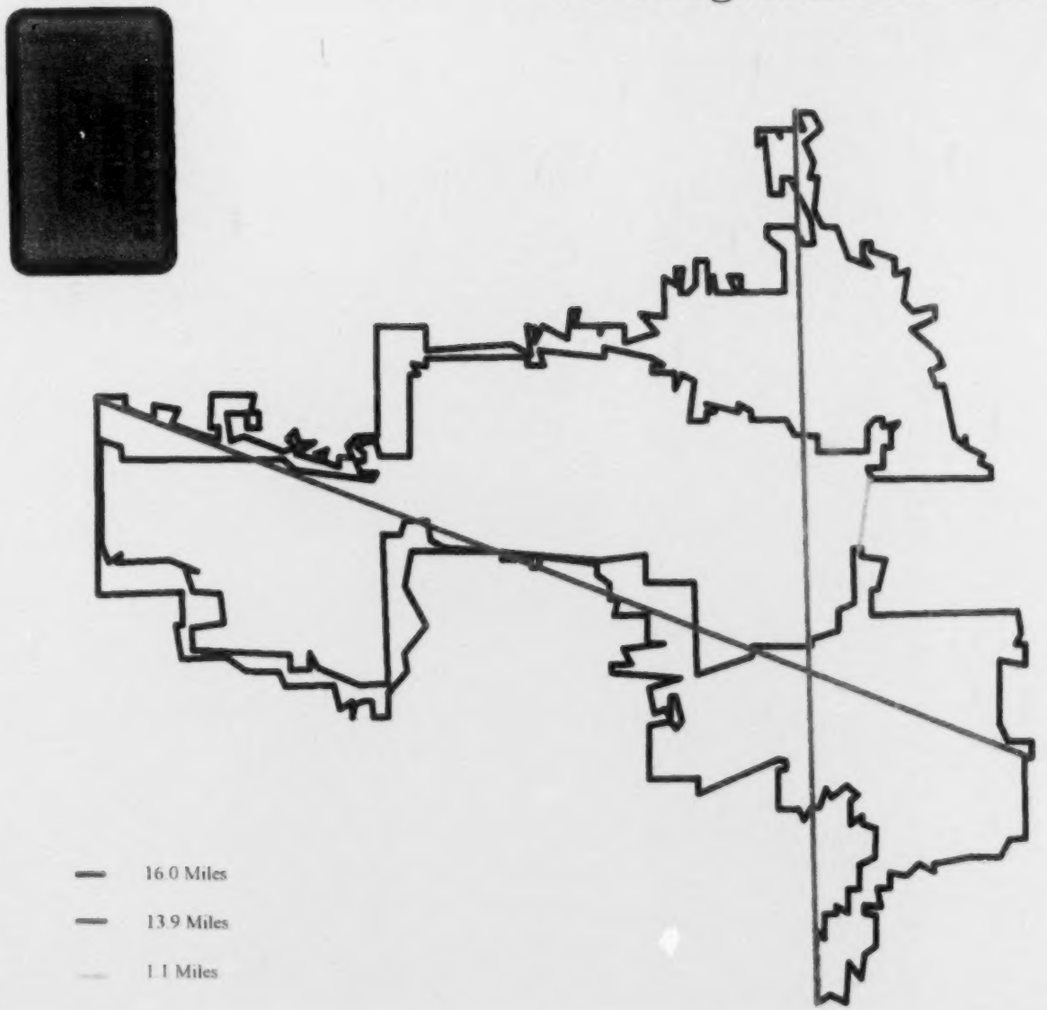
4th Congressional District



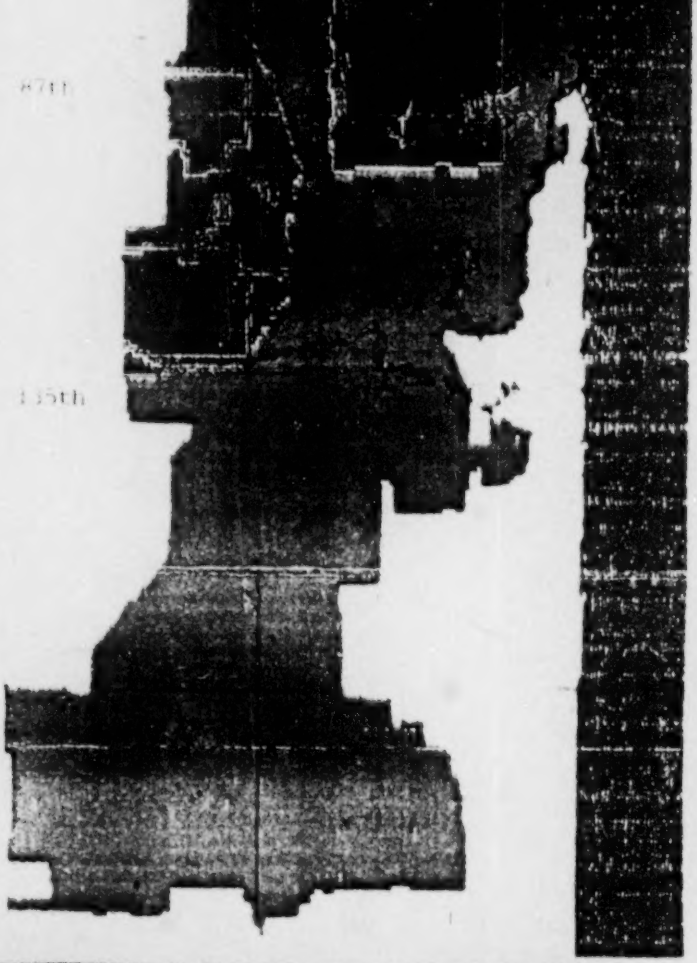
4th Congressional District

Miles
0 2 4

Metro Chicago Information Center

Source: U. S. Department of the Census

App. 2



DEFENDANT'S EXHIBIT

DISTRICT		90	90	90	90
571530		HSP POP %	NHW POP %	BLK POP %	HSP VAP %
=1	571529	6.836	25.644	66.478	5.760
=6	571524	63.859	26.732	7.284	57.977
0	571590	6.684	25.181	67.862	5.931
=571530	0	0.000	0.000	0.000	0.000
=6	571524	4.637	25.931	68.650	4.005

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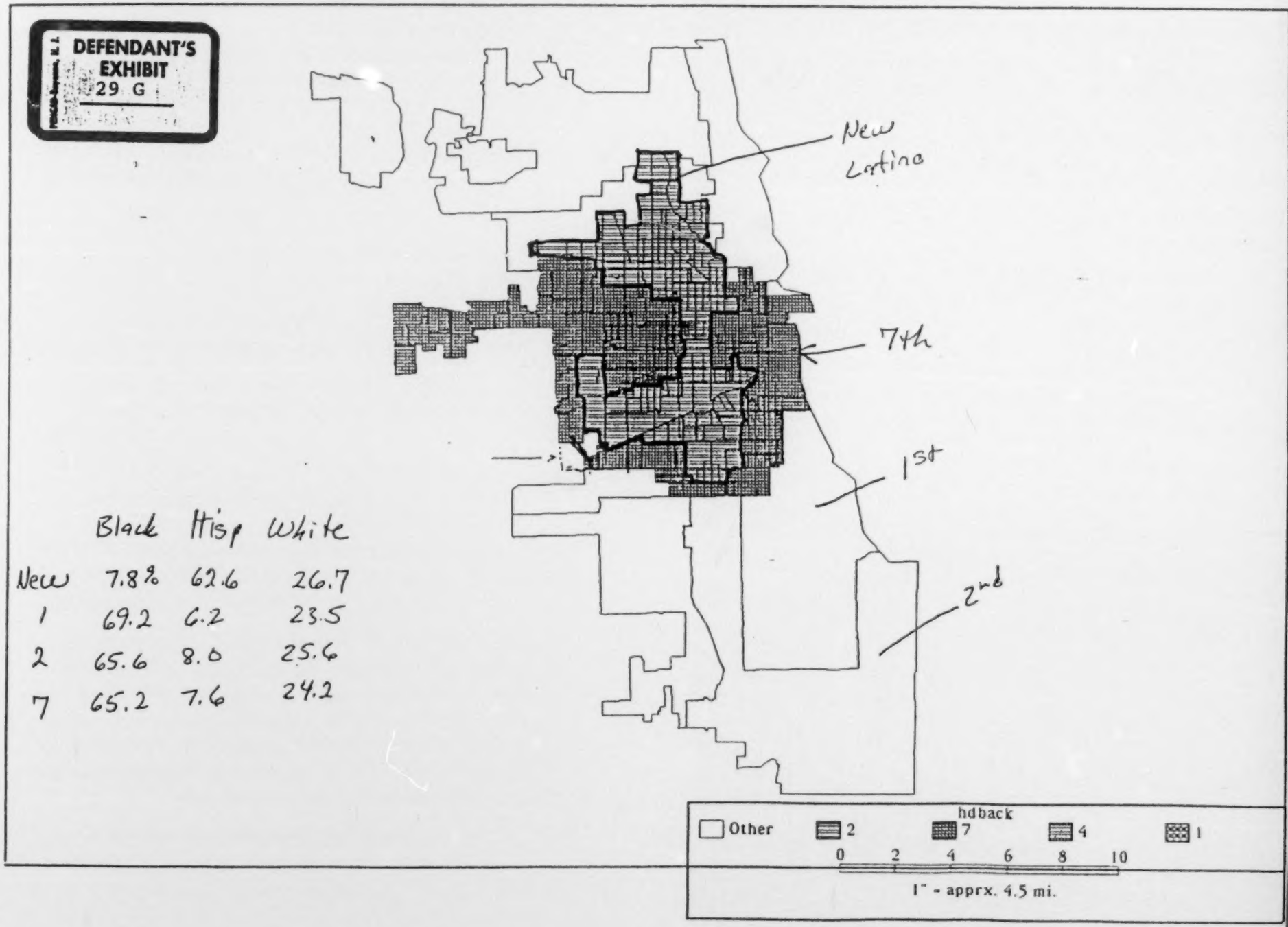
App. 3

MNVREP/MALDEF MINORITY CONGRESSIONAL DISTRICTS, JUNE 6 91

DEFENDANT'S EXHIBIT 29 G



	Black	Hisp	White
New	7.8%	62.6	26.7
1	69.2	6.2	23.5
2	65.6	8.0	25.6
7	65.2	7.6	24.2

EXCERPT TESTIMONY FROM DISTRICT EXAMINATION OF CONGRESSMAN LUIS GUTIERREZ

* * *

[p. 537] Q And does that enable you to effectively represent the 4th Congressional District?

A I believe it has.

Q Is it difficult for you to get around the district to communicate with your constituents?

A Takes me 20 minutes to get from just about any point in the congressional district from one point to another.

Q Now, have you had any trouble campaigning in the district?

A Absolutely not. It's – it's easy to campaign because it's easy to get from one church to another on Sundays, and almost all of the churches are open to me for campaigning, and the bus stops and the train stops and typical kinds of campaigning. It's easy to get around the congressional district.

I mean if you hold an activity on, you know, Damen and 47th Street and the next one is up on Western by Addison, you might get – and they're within half an hour. But it's very simple. I know of – I know that I have members and colleagues of mine in Congress who have to spend hours getting from one part of their congressional district to another part of their congressional district.

Q Is the 4th Congressional District in one media market?

A Yes, one media market, the Chicago media market.

Q And that incudes both the English and Spanish media market?

[p. 538] A Both the English and Spanish media market, which has been borne out by our citizenship campaign.

* * *

Q Now, an area that's part of the 4th Congressional District is the Stone Park area; is that right?

A Yes.

Q And do you service that area?

A Yes. I was there last Saturday and I have been there probably not as frequently as I should be. I visited that area four times at least since I become elected a member of Congress.

Q And do the residents of Stone Park in your view share the common concerns of the residents of the rest of the 4th Congressional District?

A Yes, they do.

Q And is it difficult for you to get to Stone Park?

A Straight down North Avenue or the Eisenhower Expressway, whichever suits you better, to Mannheim.

* * *

EXCERPT OF TESTIMONY FROM CROSS EXAMINATION OF CHRISTOPHER CLEVELAND

* * *

[p. 240] Q And starting with counties, this district, of course, is all in Cook County, correct?

A That's correct.

* * *

[p. 253] Q And the political subdivisions that are split, the townships and places, that is specifically because of the western connector, correct, the places and the townships?

A Yes, limited to those two categories of split political subdivisions, yes. The townships and the counties were split primarily because of the western connector.

That's also largely because the district is primarily within the city of Chicago. The way the boundaries are drawn, were there townships within the area of the city of Chicago, were it villages, were it like some other place, it certainly would have split a lot of those, too.

* * *

EXCERPT TESTIMONY FROM CROSS EXAMINATION OF CHRISTOPHER CLEVELAND

* * *

[p. 721] Q Well, let's first start with that then. In single member districts do you know – can you identify an Hispanic candidate who has ever won in a majority VAP white district?

A At this time, without the numbers, no. I could certainly concede that there aren't many of them, if that would –

Q Well, I would –

JUDGE NORGLE: Can you identify any one of those, in keeping with Mr. Jerome's question, on your winners' list?

THE WITNESS: Without the numbers, I can't because I don't – I did not put down what the VAP – what the white VAP is here.

BY MR. JEROME:

Q Now, Dr. Lichtman has that in his analysis, does he not, and as part of his report?

A Yes.

Q And so you could have looked at it and –

A In fact I did and I put it in my spreadsheet here.

Q And when doing that, did you look at or did you discover any Hispanic candidate who won in a majority with VAP district? Do you recall –

A I don't recall that, no.

* * *

Supreme Court, U.S.
FILED
JAN 7 1998
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(4)

No. 97-743

In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES R. KING, APPELLANT

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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33 pp

QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that Illinois' majority-Hispanic Congressional District Four does not violate the Equal Protection Clause.

2. Whether the district court applied a proper standard of review to the evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-743

JAMES R. KING, APPELLANT

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinions of the three-judge district court (J.S. App. 4-58, 60-74) are unreported.

JURISDICTION

The judgment of the district court was entered on August 1, 1997. A notice of appeal (J.S. App. 1-2) was filed on August 29, 1997, and the jurisdictional statement was filed on October 28, 1997. On November 18, 1997, the Clerk of the Court extended the time within which to file a response to and including December 30, 1997, and, on December 30, 1997, Justice Stevens further extended the

time within which to file a response to and including January 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

This case involves a constitutional challenge to the configuration of District Four in Illinois' 1991 congressional districting plan. That plan was ordered by a three-judge federal district court after the state legislature failed to redistrict following the 1990 census. *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). District Four is located in the City of Chicago and parts of suburban Cook County and contains a 59% Hispanic voting-age majority. The *Hastert* court believed that, without such a district, Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, would be violated because Hispanic voters would not have a meaningful opportunity to elect the candidate of their choice. This appeal involves the subsequent decisions of a different three-judge district court (containing two of the three judges who sat on the earlier three-judge court), which upheld the configuration of District Four against constitutional challenge in March 1996, and reaffirmed its decision in August 1997, on remand from this Court for reconsideration in light of *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), and *Bush* v. *Vera*, 116 S. Ct. 1941 (1996).

1. The Elections Clause of the United States Constitution, Art. I, § 4, vests in state legislatures the initial responsibility for drawing congressional districts. In this century, however, the Illinois legislature has rarely exercised that responsibility.[1] Following the 1990 census,

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[1] See *Colegrove* v. *Green*, 328 U.S. 549 (1946) (litigation arising from Illinois' failure to redistrict between 1901 and 1945). Since this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), which applied the one-person/one-vote standard to congressional districting,

the Illinois legislature again abdicated its responsibility. As a result of that census, the State was apportioned only 20 seats in Congress, a reduction from 22 in the previous decade. J.S. App. 17. Under Illinois law, the State's General Assembly was "charged with the obligation of implementing a constitutionally sound congressional redistricting plan by June 30, 1991." *Hastert*, 777 F. Supp. at 638. But the legislature "did not bring any redistricting proposal to the floor for debate, much less a vote." *Ibid.*

In light of the legislature's failure to act, five sets of plaintiffs filed suit in the United States District Court for the Northern District of Illinois. J.S. App. 17-18.[2] Each set of plaintiffs sought an order directing the State to hold elections under a constitutionally adequate, court-drawn redistricting map. *Ibid.* In addition, one group of plaintiffs contended that demographic and population changes since 1980 required the drawing of a majority-Hispanic district in order to comply with Section 2. *Hastert*, 777 F. Supp. at 638. The court granted the Illinois State Board of Elections leave to participate as a nominal defendant, which

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the State's legislature has never enacted a congressional redistricting plan. See *In re Illinois Congressional Districts Reapportionment Cases*, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981) (creating five majority African-American state legislative districts), aff'd mem. *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982); *Skolnick* v. *State Electoral Bd.*, 336 F. Supp. 839, 871 (N.D. Ill. 1971) (three-judge court).

[2] Plaintiffs were the Republican members of the State's congressional delegation (the Hastert plaintiffs); a group of Hispanic and African-American residents (the Nieves plaintiffs); a group of voters acting on behalf of the Democratic members of the State's congressional delegation (the Rosebrook plaintiffs); Democratic Representatives Cardiss Collins and Charles Hayes (the Collins plaintiffs); and the Chicago Urban League, on behalf of the African-American voters in the State's three majority-black congressional districts. J.S. App. 18. Several other voters and Members of Congress intervened as plaintiffs, as did the Harold Washington Party. *Hastert*, 777 F. Supp. at 639.

would be bound by the judgment but would neither put on a defense to liability nor participate in remedial proceedings. *Id.* at 639.

Because the State's existing congressional redistricting plan was clearly "unconstitutional and impracticable" following the 1990 census, the only issue before the court was what plan to order as a remedy. *Hastert*, 777 F. Supp. at 641. In order to prevent a delay in the State's election schedule, the district court streamlined proceedings by limiting each party to presenting a single proposed redistricting plan at trial, and by limiting trial to two days. *Id.* at 639-640. The parties, in turn, "worked diligently during discovery and the two-day trial to resolve numerous areas of significant disagreement in their competing plans." *Id.* at 640.

In particular, all parties agreed "that population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district" to satisfy Section 2. *Hastert*, 777 F. Supp. at 640. During the 1980s, the Hispanic population in Chicago and Cook County had grown at a rate substantially greater than the State's overall population growth rate of 0.0357%. Chicago's Hispanic population had increased by 29.33%, to a total of 545,852. *Id.* at 649. In Cook County as a whole, the Hispanic population had grown by 39%, to a total of 694,194. *Ibid.*; Defendant-Intervenor Exhibit (hereinafter "D-I Exh.") 10.[3] Thus, 19% of Chicago's 1990 population of 2,783,726 was Hispanic. D-I Exh. 26, at 4.

For the most part, Hispanic persons in Chicago and Cook County live in one of "two dense enclaves, one on Chicago's near northwest side and another on the near southwest side." *Hastert*, 777 F. Supp. at 649; see also J.S.

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[3] The ideal population for each of Illinois' 20 congressional districts following the 1990 census was 571,530. *Hastert*, 777 F. Supp. at 641 n.7.

App., Att. 1. Those areas are approximately one mile from one another at their closest points, and their residents share significant political, economic, and cultural interests. *Hastert*, 777 F. Supp. at 649; D-I Exhs. 20-24. Thus, "[t]he separation of the clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. Taken together, those two areas contain sufficient Hispanic population after the 1990 census to form a voting-age majority in a congressional district. D-I Exh. 19, at 3. Under the then-existing districting plan, however, Chicago's Hispanic population had largely been divided among two majority-white districts. D-I Exh. 21, at 3-4. Because "Hispanic voters in Chicago were unlikely to be able to elect a congressional candidate of their choice without drawing a congressional map that included both the north and south Hispanic communities within the same district," D-I Exh. 29, at 3-4, the *Hastert* parties agreed that it was necessary to draw such a majority-Hispanic district in order to comply with Section 2.

The existing districting plan also included three Chicago-area districts with African-American majorities (Districts One, Two, and Seven). See *Hastert*, 777 F. Supp. at 646 n.19. In accordance with Seventh Circuit precedent suggesting that a reduction in minority voting strength in those areas might violate Section 2 of the Voting Rights Act, see *Ketchum* v. *Byrne*, 740 F.2d 1398, 1406 (1984), cert. denied, 471 U.S. 1135 (1985), the *Hastert* parties agreed to retain those three majority-black districts. See *Hastert*, 777 F. Supp. at 646-648 & n.19.

Because of population shifts in the intervening decade, the configurations of those three districts would differ somewhat from their outlines on the 1981 map. See *Hastert*, 777 F. Supp. at 646 n.19. Moreover, their

configurations would affect the configuration of the majority-Hispanic district, for the large concentrations of Hispanic population lay alongside areas included in the majority-black districts. D-I Exh. 29. In particular, for two decades District Seven had comprised an area running from downtown Chicago to the city's west side. See D-I Exhs. 18, 40, 41. Since 1981, its borders had extended from Lake Michigan on the east to the suburbs of Oak Park, Maywood, Bellwood, and Broadview on the west. See *ibid.*; *Hastert*, 777 F. Supp. at 648 n.24. As a result, the largely Hispanic areas on the near north and south sides were separated by a portion of District Seven linking downtown Chicago with the west side. See *ibid.*

The participants in the *Hastert* litigation considered several configurations for the four Chicago-area majority-minority districts. See generally D-I Exhs. 25, 29. In those configurations, the majority-Hispanic district was drawn in one of three general ways. Some alternatives included a north-south Hispanic district that contained the cores of the Hispanic community and was surrounded on its eastern, southern, and western sides by District Seven. D-I Exhs. 25, 29F-29H. The parties rejected those alternatives, because they "violated numerous communities of interest by dividing Chicago's West Side and by creating an additional southwest connector for the Seventh District." D-I Exh. 29, at 6. At least two alternatives connected the predominantly Hispanic areas by including land along Lake Michigan to their east; under those scenarios, District Seven was bordered on its northern, eastern, and southern sides by the majority-Hispanic district. D-I Exhs. 25, 29B-29C. The parties rejected those alternatives, because one required the creation of two narrow connectors, and the other "violate[d] one of Chicago's most venerable communities of interest"

by dividing the "Bronzeville" area on the City's south side. D-I Exh. 29, at 4-5.

The parties ultimately proposed a plan "that connected the north and south side Hispanic communities through a western connector." D-I Exh. 29, at 5; see D-I Exhs. 25, 29D, 29I. Under that map, District Seven continued to extend from Lake Michigan to the western suburbs, but it was bounded to the west by the majority-Hispanic district's western connector. That plan "preserved the integrity of major communities of interest on the south and west sides of Chicago and developed a connector that included minimal population." D-I Exh. 29, at 5. And many of the areas included in the connector (*e.g.*, parks and vacant land) "constitute[d] natural boundaries." *Id.* at 6. Although the other alternatives would have created "a more compact Hispanic congressional district, without causing retrogression to the three African-American districts," the participants in *Hastert* all agreed to the western connector configuration in order to address concerns raised by District Seven's incumbent "regarding the shape of her district." D-I Exh. 25, at 4-5.

Because of the extensive pretrial negotiations, the *Hastert* trial focused on consideration of two proposed redistricting plans—one offered by the Hastert plaintiffs and the other offered by the Rosebrook plaintiffs. *Hastert*, 777 F. Supp. at 640, 641 & n.8. Both plans incorporated a majority-Hispanic district using a western connector. *Id.* at 648 & nn.22, 24. Both proposals also preserved Districts One, Two, and Seven with African-American voting-age majorities, and they did so "in almost identical fashion." *Id.* at 646-647. In an opinion issued on November 6, 1991, the *Hastert* court ordered the State to hold elections under the plan put forward by the Hastert plaintiffs. *Id.* at 662. The court found that the Hastert plan better satisfied the one-person/one-vote requirement (*id.* at 644-645, 662), was

"marginally superior to the *Rosebrook* plan" in affording minority voters an opportunity to elect the candidates of their choice (*id.* at 648, 651, 662), and was "likely to produce a fair distribution of congressional seats across party lines" (*id.* at 662).

Under the plan adopted by the court, District Four is 65.03% Hispanic in total population and 59.18% Hispanic in voting-age population. *Hastert*, 777 F. Supp. at 648 n.22. More than 95% of its total population, and 96.9% of its Hispanic population, is located in the two core areas on the near north and south sides; the connector contains only 4.3% of the district's total population and 3.1% of its Hispanic population. D-I Exh. 4, at 6. Although "all parties agree[d] that [Section] 2 of the Voting Rights Act * * * require[d] the creation of an Hispanic district," the district's "extraordinary configuration" prevented the court from "accept[ing] this conclusion without scrutiny." *Hastert*, 777 F. Supp. at 648. Thus, the *Hastert* court conducted its own independent review before determining that the proposed district was necessary to prevent a Section 2 violation. See *id.* at 649-651.

Applying the test in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the court first found that "the Chicago/Cook County Hispanic community is 'sufficiently large and geographically compact' to constitute a single district majority." *Hastert*, 777 F. Supp. at 649 (quoting *Gingles*, 478 U.S. at 50). It also found that "the Chicago/Cook County Hispanic community clearly is politically cohesive" and that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." *Id.* at 650. In making those findings, the court relied on "previous adjudications that found the [Hispanic] community politically cohesive" and "[p]revious judicial findings demonstrating a paucity of Hispanic officials in city and state-wide elected political offices." *Ibid.* The court also

noted that ecological regression analyses conducted by two expert witnesses demonstrated significant polarized voting in Chicago along ethnic lines. *Ibid.* Having thus found the three *Gingles* preconditions satisfied, the *Hastert* court went on to find that the failure to draw a district with an Hispanic majority would violate Section 2 under the "totality of circumstances." *Ibid.* To make that finding, the court relied principally on the "judicially recognized history of discrimination, both past and recent, against the Chicago Hispanic community and its attendant impact on effective political participation and representation." *Ibid.*

2. Appellant James R. King, a resident of District Four, filed this action in February 1995. J.S. App. 5. He alleged that District Four, as adopted by the *Hastert* court, violates the Fourteenth Amendment standards of *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*). J.S. App. 5-6.[4] On March 7, 1996, the three-judge court issued an opinion denying appellant's requests for preliminary and permanent injunctive relief. *Id.* at 4-58 (*King I*). The court recognized that neither the *Hastert* court's findings of fact nor its judgment could bind appellant under the principles of issue preclusion and claim preclusion. *Id.* at 12. The court did admit into evidence the *Hastert* court's findings of fact, and the court accepted those findings in the absence of a showing of clear error or changed factual circumstances. *Id.* at 12-16. However, the court did not limit appellant to the record developed by the parties in *Hastert*. Indeed, although the court took judicial notice of

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[4] The court permitted several parties to intervene as defendants, including some parties who had participated in *Hastert* (District One's incumbent Representative Bobby Rush, Al Johnson, Neomi Hernandez, and the Chicago Urban League) and some who had not (Timuel Black, Elvira Carrizales, and the United States). J.S. App. 6 & n.4.

the evidence presented to the *Hastert* court in order to establish the evidentiary record on which that court relied to make its findings, the court did not even admit portions of the *Hastert* record as substantive evidence unless the parties in the instant action moved for the admission of a particular exhibit. *Id.* at 16. The district court also determined that the law of the case doctrine prevented it from disturbing the *Hastert* court's legal conclusions absent manifest error or an arguable change in decisional law. *Id.* at 16-17. Nonetheless, because both *Miller* v. *Johnson*, 515 U.S. 900 (1995), and *Shaw I* arguably changed the law, the court reviewed *de novo* the *Hastert* court's conclusion "that the district's extraordinary configuration was necessary to 'satisfy constitutional principles.'" J.S. App. 25.

On the merits, the district court held that a court-ordered redistricting plan must be held to at least as stringent a standard as this Court applied in *Miller* to legislatively drawn plans. J.S. App. 30-37. Applying *Miller*, the court held that strict scrutiny was warranted because "the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District." *Id.* at 40. The district court imposed on the defendants the burden to prove that the district was narrowly tailored to serve a compelling interest. *Id.* at 30 & n.36.

The district court found that the defendants had carried their burden. The court concluded that a majority-Hispanic district was necessary to prevent a violation of Section 2. J.S. App. 47-53. The court held that the Hispanic community "was sufficiently numerous to constitute a majority in a properly drawn district" (*id.* at 50) and that "the *Hastert* court's finding of geographic

compactness was appropriate" (*id.* at 53). The court also found that the Chicago Hispanic community was politically cohesive and that the district drawn by the *Hastert* court has "protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate." *Id.* at 55.[5] The court finally found that District Four was narrowly tailored to the interest in avoiding a Section 2 violation. *Id.* at 56-57. It noted that the *Hastert* court had "subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation." *Id.* at 57. The court found that District Four did not contain an unnecessarily large Hispanic population and that its "extraordinary configuration" was necessary "to preserve shared communities of interest and protect the three African-American supermajority districts against impermissible retrogression" that would violate the Voting Rights Act. *Ibid.*

3. Appellant appealed the district court's March 1996 judgment in *King I* to this Court. On June 13, 1996, while that appeal was pending, the Court issued its decisions in *Shaw II* and *Bush*. The United States subsequently filed a motion in the *King I* appeal urging the Court to vacate and remand so that the district court might have the first opportunity to address the application of this Court's new decisions to the facts of this case. By order dated November 12, 1996, this Court vacated the district court's judgment and remanded the case "for further consideration in

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[5] The district court did not review or supplement the *Hastert* court's finding that, under the totality of the circumstances, the failure to draw a district with an Hispanic majority would violate Section 2, because appellant did not challenge that finding of the *Hastert* court. J.S. App. 53.

light of" *Shaw II* and *Bush*. *King* v. *State Bd. of Elections*, 117 S. Ct. 429 (1996).

On remand (*King II*), the district court undertook "a full review of the underlying record" and reaffirmed its earlier factual findings. J.S. App. 61-62. The court also "carefully examined" *Shaw II* and *Bush* and found "both cases supportive of its analysis." *Id.* at 61. The court reaffirmed its earlier conclusions that strict scrutiny applies (*id.* at 62); that remedying a potential violation of, or achieving compliance with, Section 2 constitutes a compelling state interest (*id.* at 65); and that District Four is narrowly tailored to prevent a violation of Section 2 (*id.* at 65-73).

With respect to the issue of narrow tailoring, the court specifically determined that there is "a 'strong basis in evidence' for finding the threshold conditions for [Section 2] liability" (J.S. App. 67), that District Four "remedies the anticipated violation and achieves [S]ection 2 compliance" (*id.* at 72), and that the consideration of race reflected in the district's configuration "is no more than reasonably necessary to fulfill its remedial purpose" (*id.* at 73). Finding nothing in *Shaw II* or *Bush* that would require amending or altering its decision in *King I*, the district court again concluded in *King II* that District Four "passes constitutional muster." *Ibid.*

ARGUMENT

The district court's judgment should be affirmed. The court carefully and correctly applied the governing legal principles set out by this Court to the facts and circumstances of this case. Applying strict scrutiny to District Four, the district court found that drawing a majority-Hispanic district in Chicago and Cook County was necessary to prevent a violation of Section 2 of the Voting Rights Act. In reaching that conclusion, the

district court did more than reaffirm the *Hastert* court's earlier findings that the preconditions to a Section 2 violation existed and that, absent a district with an Hispanic majority, a violation was confirmed by the totality of circumstances. The district court also engaged in its own analysis of the record and found that the *Hastert* court's determinations were both well supported by the evidence before that court and confirmed by more recent evidence. The court also found that District Four properly prevented the Section 2 violation and that its configuration is necessary to serve that compelling interest, while at the same time protecting communities of interest and complying with the Voting Rights Act's requirement that African-American voters be assured an equal opportunity to elect the representatives of their choice. Those findings amply support the district court's conclusion that District Four satisfies the narrow tailoring standards set forth in *Shaw II* and *Bush*.

1. Although "[s]trict scrutiny remains, nonetheless, strict," *Bush*, 116 S. Ct. at 1961 (plurality opinion), this Court has rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995) (citation omitted). A congressional district will survive strict scrutiny if its delineation is narrowly tailored to serve a compelling state interest. See *Bush*, 116 S. Ct. at 1960 (plurality opinion); *Shaw II*, 116 S. Ct. at 1902; *Miller*, 515 U.S. at 920. Here, the district court correctly found that District Four is narrowly tailored to serve the compelling interest of avoiding a violation of Section 2. J.S. App. 46-57.[6]

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[6] Appellant incorrectly asserts (J.S. 27-28) that the district court placed the burden of establishing the lack of a compelling interest and narrow tailoring on the plaintiff. To the contrary, the court explicitly

a. This Court has held that remedying past discrimination is a compelling state interest. See *Shaw I*, 509 U.S. at 656; *Miller*, 515 U.S. at 920. Consistent with that holding, ensuring compliance with Section 2 is also a compelling state interest. See *Bush*, 116 S. Ct. at 1968 (O'Connor, J., concurring); *id.* at 1989 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); *id.* at 2007 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting). Such a compelling interest exists when there is "a strong basis in evidence for concluding that the *Gingles* factors are present." *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring); see also *id.* at 1960-1961 (plurality opinion); *id.* at 1971 (Kennedy, J., concurring). Here, the district court found more than a "strong basis in evidence" that the preconditions for a Section 2 violation exist. The court found a majority-Hispanic district necessary to prevent an actual, proven violation of Section 2. J.S. App. 55-56.

The district court explained that the *Hastert* court examined each of the three *Gingles* preconditions, as well as the totality of the circumstances, and found that the failure to draw a district in Cook County with an Hispanic majority would dilute Hispanic voting strength in violation of Section 2. J.S. App. 47-57. The district court did not, however, rely solely on the *Hastert* court's findings. The court conducted an independent review of the evidence relating to the *Gingles* preconditions. It found that the Hispanic population in the Chicago area is sufficiently large and geographically compact "to constitute a majority in a properly drawn district" and that appellant had not provided any "competent evidence" to the contrary. *Id.* at 50 & n.58, 52-53. The district court also

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held that, "once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified." J.S. App. 30; see also *id.* at 31 n.36.

found that Chicago's Hispanic community is politically cohesive and that appellant's contrary evidence "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions [appellant] seeks to draw." *Id.* at 50-51 & n.59. Finally, the court found that "ecological regression analysis and extreme case performance of forty-one elections held between 1983 and 1995 establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *Id.* at 51-52. Thus, the district court concluded that "the problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain." *Id.* at 52.

Those findings are sufficient to establish a compelling state interest. Without a majority-Hispanic district, members of the sizeable Hispanic population in Chicago and the rest of Cook County would lack a meaningful opportunity to elect the candidate of their choice in any single congressional district. Cf. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1015 (1994); see also note 9, *infra*. The jurisdiction would thus have an electoral scheme that violates Section 2.

b. Appellant has not established that any of the factual findings by the district court are clearly erroneous. Appellant's contention (J.S. 13-15) that the district court erred in finding that the Hispanic population in Chicago and Cook County is geographically compact is unpersuasive. As the *Hastert* court found (777 F. Supp. at 649), the Hispanic population of Chicago and Cook County is concentrated in two dense enclaves located no more than a mile away from each other. These two areas comprise the bulk of the district contested here—more than 95% of its total population and almost 97% of its Hispanic population —and, taken together, alone contain a sufficient Hispanic population to form a voting-age majority in a congressional district. See pages 4-5, 8, *supra*.

The district court independently reaffirmed the *Hastert* court's finding. The court explained that "a fairly small rectangle can be drawn around the two [Hispanic] enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic population within the City of Chicago. This rectangle serves as evidence of the Hispanic community's geographic compactness." J.S. App. 43 n.48; *id.* at 67-68. Appellant's response that the rectangle is not coextensive with District Four (J.S. 14) improperly equates the compactness of an area's minority population with the compactness of the district created to serve that population. "The first *Gingles* condition refers to the compactness of the minority *population*, *not* to the compactness of the contested *district*." *Bush*, 116 S. Ct. at 1971 (Kennedy, J., concurring) (emphases added); see *Gingles*, 478 U.S. at 50.

Appellant's argument (J.S. 15-16) that Hispanics are not sufficiently numerous to constitute a majority of voting-age *citizens* in a congressional district is equally unavailing. In support, appellant points only to the testimony of his own witness, who stated that District Four, as drawn, had an Hispanic citizen voting-age population of no more than 45%. This Court has explicitly reserved the question of "which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy." *De Grandy*, 512 U.S. at 1008. The district court properly declined to resolve that question here, for appellant did not "establish[] via competent evidence that the Hispanic citizen voting age population falls below fifty percent" in District Four. J.S. App. 50. The court found "too many uncertainties surrounding the validity of the data" reported by appellant's witness to credit the witness's conclusion. *Id.*

at 50 n.58.[7] The district court's finding is not clearly erroneous. The 1992 and 1994 congressional elections, in which District Four elected an Hispanic to Congress (*id.* at 5), indicate that Hispanic voters in the district are numerous enough that they "ha[ve] the potential to elect a representative of [their] own choice"—the focus of the first *Gingles* precondition (*id.* at 47-48, quoting *Growe* v. *Emison*, 507 U.S. 25, 40 (1993)). See also *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (reasonably compact districts containing 44% and 45.6% African-American population demonstrate that African-Americans are sufficiently numerous to satisfy first *Gingles* precondition).

Appellant also fails (J.S. 16-19) to demonstrate that the district court's finding of racial bloc voting was erroneous. The district court correctly found that appellant's claim that white racial bloc voting is not a problem is not "supported by recent city-wide election results or meaningful statistical analysis." J.S. App. 51. The court instead credited testimony supported by regression and extreme case analysis that "establish[ed] a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *Id.* at 51-52. Despite appellant's

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[7] Citizenship data were unavailable at the time of redistricting. J.S. App. 50 n.58. Moreover, the Census Bureau reports citizenship data only at the census block group level, not at the smaller census block level at which the district lines were drawn. Thus, appellant's estimate of the Hispanic citizen population in District Four may not properly account for variations in citizenship levels among different blocks. *Ibid.* The witness's precinct-by-precinct citizenship estimate also generated several anomalies that cast further doubt on its accuracy; for example, he estimated that the Hispanic citizen voting-age population was *larger* than the Hispanic voting-age population in 605 precincts. See Tr. 273-274; D-I Exh. 51. Finally, appellant's citizenship estimate did not take account of increases in the Hispanic citizen population in District Four since 1990 due to intervening naturalizations and an amnesty program. J.S. App. 51 n.58.

dissection of that testimony, appellant does not contradict its central finding that Hispanic candidates of choice have been unable to win in voting districts lacking an Hispanic majority.[8] That finding is sufficient to support the district court's conclusion that white bloc voting is a continuing problem.[9]

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[8] The district court acknowledged that three Hispanic candidates have recently been elected in city-wide elections. The court explained, however, that two of the candidates won because the white vote split among several white candidates, and the third was slated by the dominant Democratic Party. J.S. App. 51. With that exception, the district court noted, "the Democratic Party has not slated an Hispanic candidate for alderman, state senate, state representative, or congress in any district with a white majority voting age population." *Ibid.*

[9] Appellant's attack on the *Hastert* court's finding that there would be a Section 2 violation without a majority-Hispanic district under the "totality of the circumstances" (J.S. 19-21) is not properly before this Court because appellant did not contest the finding in the district court, see J.S. App. 53. See, *e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). In any event, appellant's argument lacks merit. The *Hastert* court properly relied on a "judicially recognized history of discrimination, both past and recent, against the Chicago Hispanic community and its attendant impact on effective political participation and representation." 777 F. Supp. at 650. Appellant's suggestion that the *Hastert* court could not rely in 1991 on judicial findings made in 1982 and 1984 is without support. The district court noted, moreover, that the *Hastert* court "found that this historical discrimination against the Hispanic community was on-going." J.S. App. 54-55. And the district court reaffirmed the *Hastert* court's conclusion on remand during its consideration of whether District Four is narrowly tailored to remedy the Section 2 violation. *Id.* at 68-69. The district court also found that political discrimination persisted even after 1991 in the form of "a definite and continuing pattern of white racial-bloc voting against Hispanic candidates" (*id.* at 51-52) and "exclusion of Hispanics from the powerfully important slating process" (*id.* at 52). Finally, appellant offers no countervailing evidence to suggest that Hispanics in fact enjoy equal political opportunity. And, unlike the situations discussed by this Court in *De Grandy*, 512 U.S. at 1011-1015 & n.10, in this case,

c. Appellant's contention (J.S. 6-12) that District Four is not narrowly tailored to the compelling interest in complying with Section 2 is also without merit. In *Shaw II* and *Bush*, this Court established two requirements for demonstrating that a district is narrowly tailored to the compelling interest in avoiding a Section 2 violation. First, the district must "substantially address[] the [Section] 2 violation." *Shaw II*, 116 S. Ct. at 1907. Second, if the district deviates substantially from the district that a court would hypothetically draw to remedy the Section 2 violation, that deviation must not be "predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy." *Bush*, 116 S. Ct. at 1961 (plurality opinion); *id.* at 1970 (O'Connor, J., concurring). District Four satisfies both those criteria.

First, District Four "substantially addresses the [Section] 2 violation." *Shaw II*, 116 S. Ct. at 1907. District Four includes both of the geographically proximate compact areas of Hispanic population that require the creation of a majority-Hispanic district under Section 2. Those two areas are left wholly intact by the district; form the geographic core of the district; contain more than 95% of the district's total population; and are located close together, approximately one mile from each other. As the district court found, District Four has served its remedial purpose well and "has protected the Hispanic community since 1991 from the invidious effects of racial block voting that, regrettably, retains its chokehold on the Chicago electorate" (J.S. App. 55) by enabling the community to elect the candidate of its choice in each election since 1991.

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absent a majority-Hispanic district, the Hispanic population of Chicago and Cook County would be unable to elect the candidate of its choice in any single-member district.

Second, to the extent that District Four substantially deviates from a hypothetical Section 2 district, the deviations are not "predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy." *Bush*, 116 S. Ct. at 1961 (plurality opinion). Rather, District Four presents the unobjectionable "case of an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation." *Id.* at 1962.

The district's most significant deviation is its linking of the two closely aligned core areas by using a western connector, rather than by joining those two sections at their closest points.[10] The use of the western connector was not improperly motivated by racial considerations. Rather, it was motivated by essentially political considerations, primarily the desire to avoid either disruption of District Seven, which lies between the core Hispanic areas, or division of various other communities of interest.

Contrary to appellant's suggestion (J.S. 10-11), the western connector was not included in order to increase

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[10] Appellant also complains about "the 'ragged' boundary surrounding the district" (J.S. 29), which he attributes to its being drawn on the census block level (see also J.S. 11-12), the promontory points on the north and south sections of the district that capture additional Hispanic population (J.S. 12), and "excessive" splitting of political subdivisions (J.S. 7-9). But drawing the district at the census block level was necessary to comply with the strict one-person/one-vote requirement. Tr. 216-217. And appellant has not shown that the resulting "raggedness," the inclusion of the two promontory points, or the number of split subdivisions results in any substantial deviation from a hypothetical remedial district. Indeed, the district court specifically found that the number of split subdivisions was not excessive but comparable to other Illinois congressional districts. J.S. App. 45, 72 & n.5. See also *Gingles* v. *Edmisten*, 590 F. Supp. 345, 374 (E.D.N.C. 1984) (three-judge court) (remedial district need not be "a model of aesthetic tidiness"), aff'd in part, rev'd in part *sub nom. Thornburgh* v. *Gingles*, 478 U.S. 30 (1986).

the Hispanic composition of District Four. Indeed, a majority-Hispanic district could equally well have been created by connecting the two core areas either at their closest points in the center or by use of an eastern connector,[11] as proposed in several alternative plans. See D-I Exhs. 29F-29H. The two dense areas making up the core of District Four themselves contained sufficient Hispanic population to constitute a majority in a congressional district, regardless of which type of connector was used. See page 5, *supra*.[12] Because District Four enclosed both of those core areas, there was no need to draw a connector on the basis of race in order "to make up for minority populations closer to [the district's] core that it

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[11] Nothing in this Court's precedents supports appellant's suggestion (J.S. 11, 14) that the need for *any* connector precludes a finding that the minority population is sufficiently compact to require creation of a majority-minority district.

[12] The district in this case is thus factually quite distinct from the districts invalidated in *Shaw II* and *Bush*, which joined numerous, widely dispersed African-American populations. For example, one North Carolina district, "approximately 160 miles long and, for much of its length, no wider than the [Interstate]-85 corridor," "wind[ed] in snakelike fashion" through such diverse areas as tobacco farms and manufacturing centers "until it gobble[d] in enough enclaves of black neighborhoods." *Shaw II*, 116 S. Ct. at 1899 (quoting *Shaw I*, 509 U.S. at 635-636). In the Texas case, the district had only half of its population in a fairly compact core and otherwise consisted of seven "narrow and bizarrely shaped tentacles" extending out in various directions "only to pick up a small * * * area with a high African-American concentration." *Bush*, 116 S. Ct. at 1954-1955 (plurality opinion). District Four, in contrast, is the smallest in area of all the 1991 Illinois congressional districts (J.S. App. 101), and the connector contains a lower concentration of Hispanics than the rest of the District (see page 8, *supra*) and primarily vacant unpopulated land (J.S. App. 44 n.49).

shed in a further suspect use of race." *Bush*, 116 S. Ct. at 1961 (plurality opinion).[13]

The purpose of the connector was to create a contiguous district that would not disrupt the configuration of District Seven or other communities of interest. Contrary to appellant's contention (J.S. 11, 21-22), the desire to avoid disruption of District Seven's existing configuration is not equivalent to the desire to maintain the District's African-American population percentage. The alternative configurations—using a central or eastern connector—all maintained District Seven with at least a 65% black population. See D-I Exhs. 29B, 29C, 29E-29H. Those alternatives were rejected for nonracial reasons. They divided communities of interest, "disrupt[ed] the

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[13] Appellant complains that, where the western connector goes through populated areas, "the mapmakers consistently sought out the highest percentage of Hispanic population" (J.S. 10) in order to "maximize the percentage of Hispanics" in the district (J.S. 11). Similarly, appellant complains (J.S. 12) that District Four's northern and southern promontory points were included in order to "capture additional Hispanic population" (J.S. App. 44) (emphasis omitted). Those contentions are not supported by the record and do not raise significant issues in any event. The *Hastert* court found, and the district court reaffirmed, that the Hispanic population in the two geographically proximate core areas having a shared community of interest was sufficiently large to constitute a voting majority in a single district, that a majority-Hispanic district must therefore be created in order to comply with Section 2, and that a western connector was the least intrusive way of uniting the two core areas into a single contiguous district. See pages 8-11, *supra*. Moreover, the population of the connector comprises only 4.3% of District Four's population and an even lower percentage of its Hispanic population. See page 8, *supra*. Given those facts, the inclusion of areas, in the connector or adjacent to the core areas, with populations likely to share the same (or a similar) community of interest as the population of the core areas is both consistent with traditional districting principles (see note 10, *supra*) and of minimal relevance to the overall composition of the district.

traditional connection between the African-American communities on the south and west sides of the City of Chicago" (D-I Exh. 18, at 4), and unnecessarily disturbed the existing configuration of District Seven, upsetting the relationship between the district's incumbent and her constituents. See D-I Exhs. 18, 25, 29. The parties and the court in *Hastert* drew District Four with a western connector to respond to those "predominantly nonracial, political" concerns (*Bush*, 116 S. Ct. at 1962 (plurality opinion)). See J.S. App. 57.

Especially illuminating on this point was the Declaration of Dr. James Hoffman Lewis of the Chicago Urban League (D-I Exh. 29). Dr. Lewis stated that the goal of the League (and other parties to the *Hastert* litigation) was to find "the most efficient means" of creating an "Hispanic-majority district that would not violate the integrity of the three existing African-American majority districts" (D-I Exh. 29, at 3), using "traditional districting principles such as consideration of location of communities of interest, historic cores of districts, and political structures" (*id.* at 4). He expressed concern that the use of an eastern connector would divide the "Bronzeville" area in southeast Chicago, disturbing "one of [the city's] most venerable communities of interest" (*id.* at 5), and the use of a central connector would disturb "numerous communities of interest by dividing Chicago's West Side" (*id.* at 6). He further stated that a western connector, on the other hand, allowed for the creation of a majority-Hispanic district while "preserv[ing] the integrity of [all] major communities of interest on the south and west sides of Chicago" (*id.* at 5).

Those considerations were of particular importance to the District Seven incumbent, who had represented that district since 1973. See Declaration of Congresswoman Cardiss Collins, D-I Exh. 31, at 1. Congresswoman

Collins emphasized the importance of the *Hastert* court's adoption of a redistricting plan that would ensure that communities "that have been a part of [her] district for three decades" continue as part of District Seven, and that would "preserve[], to the greatest extent possible, the historical boundaries" of her district. *Ibid.* Collins further noted that the residents of "both the city and the suburban portions of [her] district" are "highly cohesive politically" and "share a community of interests with respect to housing issues, public education issues, jobs, health care, and welfare that make it particularly appropriate that they be included in a single congressional district." *Id.* at 2. Those legitimate considerations were the predominant motivation for the adoption of—and fully justify—the present configuration of the majority-Hispanic District Four.

Section 2 required that a majority-Hispanic district be created because, *inter alia*, the Hispanic population is sufficiently compact that a geographically compact majority-Hispanic district *could* have been created by joining the two core areas at their closest point with a "central connector." Neither Section 2 nor the Fourteenth Amendment, however, requires that a remedial district be created precisely *in that manner*. "States are not prevented from taking into account race-neutral factors in drawing permissible majority-minority districts." *Bush*, 116 S. Ct. at 1972 (Kennedy, J., concurring). A district is still narrowly tailored if its departure from compactness is based on accommodation of neighboring districts for reasons consistent with traditional districting principles. The mere fact that the adjacent District Seven is majority-black does not negate the legitimate interest in accommodating that district, and it does not make the determination to accommodate that district an improper racial consideration. If District Seven had been

a majority-white district, the selection of the "western connector" in configuring District Four to accommodate the configuration of District Seven, and the retention of an electorate by an incumbent, would clearly have reflected legitimate, nonracial considerations. See *White* v. *Weiser*, 412 U.S. 783, 793-797 (1973) (incumbency protection is a legitimate districting principle); *Bush*, 116 S. Ct. at 1960 (Section 2 district need only be "*reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries"). Those legitimate, nonracial considerations are not rendered illegitimate because District Seven is majority-black.

The very nature of the proceedings in *Hastert* shows that the district court's primary objective was to ensure that the configuration of District Four accommodated as many as possible of the competing interests represented in that suit, while still uniting the Hispanic community in a single district. The five sets of plaintiffs in *Hastert* included African-American, Hispanic, and white voters, and also included both Democratic and Republican elected officials. The Illinois State Board of Elections chose to participate only as a nominal defendant, neither defending itself against liability nor taking part in the remedial phase of the case. The remaining parties, having submitted a variety of alternative redistricting plans to the court, engaged in extensive negotiations pursuant to streamlined procedures outlined by the court (see *Hastert*, 777 F. Supp. at 639) and ultimately agreed to submit for the court's review the two alternative plans which best satisfied all of their competing interests—both of which included a majority-Hispanic district using a western connector. The court chose the plan that, in its view, better satisfied the one-person/one-vote requirement; was "marginally superior" in affording minority voters an

opportunity to elect the candidates of their choice; and was most likely to result in "a fair distribution of congressional seats across party lines." *Id.* at 662.[14]

Under those circumstances, the district court correctly concluded that the configuration of District Four—particularly the use of the western connector—is a legitimate response to predominantly political concerns that traditionally are reflected in redistricting actions. See J.S. App. 70 n.4.[15]

2. Appellant's final contention (J.S. 22-26) is that the district court erred in treating him as bound by the findings in *Hastert*, thereby depriving him of "a *de novo* review of the evidence" as was his right as "a non-party to the [earlier] proceeding." J.S. 23. Contrary to appellant's implication, the district court explicitly acknowledged that the *Hastert* court's findings did not preclude appellant's claim or bind him on any issue. J.S. App. 12 & n.11. The district court properly recognized, however, that the *Hastert* proceedings are not irrelevant to appellant's cause of action.[16] Indeed, the *Hastert* proceedings are of central importance to appellant's claim. The only action of the State of Illinois that appellant challenges is

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[14] Certainly it is not necessary for this Court to conduct a "beauty contest[]" between the two alternative plans presented to the *Hastert* court at trial. Cf. *Bush*, 116 S. Ct. at 1960 (plurality opinion).

[15] There is no merit to appellant's contention (J.S. 28) that District Four should have been subjected to scrutiny even more stringent than strict scrutiny because it was judicially created. The district court in this case applied the most demanding scrutiny that this Court has employed in considering Equal Protection Clause challenges.

[16] Appellant himself concedes (J.S. 23-24) that the evidence in *Hastert* is "relevant to this case not only because the *Hastert* court approved District [Four] but also because it found that the presence of the threshold conditions of *Gingles* and of the *Zimmer* factors established a [Section 2] violation."

its implementation of the districting plan ordered by the *Hastert* court. Thus, this "lawsuit is at its very core a challenge to the *Hastert* court's order." *Id.* at 14.

Under those circumstances, the district court quite correctly admitted into evidence the *Hastert* court's findings and properly took judicial notice of the record on which those findings were based. To determine whether the *Hastert* court's plan was subject to strict scrutiny, and, if so, whether District Four's configuration was justified by Section 2, the district court had to consider the *Hastert* court's actual purpose and the evidence before it at the time. See *Shaw II*, 116 S. Ct. at 1902 n.4, 1903; cf. *United States* v. *Virginia*, 116 S. Ct. 2264, 2277 (1996).

Contrary to appellant's suggestion, the district court did not limit appellant to the record established in *Hastert*, nor did it treat the *Hastert* court's findings as conclusive.[17] Although appellant complains (J.S. 22) that the court assigned too much weight to those findings by accepting them absent a showing of clear error or changed circumstances (see J.S. App. 16), appellant does not point to a single finding that was affected by that standard of review. To the contrary, the district court carefully considered the evidence adduced by appellant and in many cases found it wanting in terms that would disentitle him to relief under *any* standard.[18] In addition, although the

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[17] Indeed, appellant acknowledges that he had the opportunity to submit a wide range of evidence not only bearing on the validity of the findings of the *Hastert* court but also going to the underlying issue of whether District Four is narrowly tailored to prevent a violation of Section 2. See J.S. 24.

[18] See J.S. App. 50 (appellant presented no "competent evidence" on the citizenship issue, and his evidence on the lack of political cohesion "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions [appellant] seeks to draw"); *id.* at 51 (as to racial bloc voting, "[n]either proposition advanced by

district court stated that the law of the case doctrine provided the appropriate standard for reviewing the *Hastert* court's legal conclusions, the district court reviewed the *Hastert* court's basic conclusion that District Four is necessary to satisfy constitutional and statutory requirements *de novo* because *Shaw I* and *Miller* changed the governing law. *Id.* at 25.

Appellant's criticism (J.S. 27 n.17) that the district court gave deference to the "*Hastert* court's discretion in selecting an appropriate remedy" (J.S. App. 56, citing *United States* v. *Paradise*, 480 U.S. 149, 183-185 (1987) (opinion of Brennan, J.)) is unpersuasive. On remand, the district court independently applied the standards set out in *Shaw II* and *Bush* to conclude that the remedy chosen by the *Hastert* court is narrowly tailored. J.S. App. 67-73. Even in its initial opinion, the district court found that the *Hastert* court's remedy "was properly proportioned to the nature of the violation" because it avoided Section 2 liability while preserving the three majority-black districts and protecting communities of interest. *Id.* at 57. In any event, deference to the *Hastert* court's remedial finding did not deprive appellant of anything to which he was legally entitled. Even if he had been a party in *Hastert* and had appealed its final judgment, some deference to the district court's remedial discretion would have been warranted. See *Paradise*, 480 U.S. at 183-185 (opinion of Brennan, J.). The fact that appellant did not participate in the earlier litigation does not dilute the *Hastert* court's remedial authority in discharging its "unwelcome obligation" (*Connor* v. *Finch*, 431 U.S. 407, 415 (1977)) to draw a constitutional districting plan after the state legislature

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[appellant] is supported by recent city-wide election results or meaningful statistical analysis").

defaulted on its responsibility to do so. See also *Lawyer* v. *Department of Justice*, 117 S. Ct. 2186 (1997).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JANUARY 1998

No. 97-743

Supreme Court, U.S.
JAN 15 1998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

James R. King,
Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF OPPOSING MOTIONS TO AFFIRM

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The opinions of the three-judge panel district court (App. 4-58, 60-74) are reported at 979 F.Supp. 582 and 979 F.Supp. 619.

ARGUMENT

I. District 4 was Not Narrowly-Tailored under an Application of Strict Scrutiny because of the Significant Deviations from Traditional Districting Principles.

In the context of narrow-tailoring the Department of Justice (hereinafter "DOJ") suggests that the "western connector" was created for nonracial reasons, presumably asserting that the remainder of District Four, carved intricately block-by-block, was narrowly-tailored in its use of race. The evidence cited by DOJ in the record, however, does not support that the "western connector" was predominantly politically motivated.[1]

Relying upon the affidavit of Dr. James Lewis, the DOJ suggests that there were "historic cores of districts" which the parties in *Hastert* sought to preserve. This, however, was not a traditional districting principle nor non-racially applied in the *Hastert* proceeding because the *Hastert* court

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1 The DOJ has no basis to assert, moreover, that "[t]he parties and the court in *Hastert* drew District Four with a western connector to respond to those 'predominantly nonracial, political' concerns" (citing Opinion 1 at App. 57) because the lower court never found that any portion of District Four was drawn for nonracial reasons, but that all the districts were created in such a way as to prevent "impermissible retrogression". Opinion 1, App. 57.

In *Hastert* the district court did not discuss any of the reasons for the creation of the "western connector" except that

> [t]he location of the Chicago Hispanic community in two highly concentrated enclaves on either side of the 7th Congressional District on Chicago's near northwest and near southwest sides necessarily requires an odd configuration to accommodate the creation of an Hispanic district and the three super-majority African-American districts dictated by the Voting Rights Act.

Id. at 650.

dissolved several historic cores in the plan that existed prior to *Hastert*, particularly District Five in the 1981 congressional districting plan, for the sake of creating majority-minority districts under §2; elsewhere, the historic cores of districts did not take precedence over §2 concerns. See, Congressional Districts of Northeast Illinois, Supp. App. 1. The DOJ further asserts that District Seven also sought to keep intact communities that have been together for the last three decades and, without the use of a "western connector", other "communities of interest"[2] would have been "disturbed". DOJ Motion, 20, 21-22, 23. Review of the 1981 congressional map indicates that numerous communities were rearranged into the majority-minority districts as a result of the *Hastert* case. This is consistent with the observation in *Hastert* that

> [t]he present minority districts (1st, 2nd, 7th) have experienced significant losses in population, . . . particularly African-American population, . . . over the past ten years. In addition, the Chicago area African-American population appears to have shifted southward between 1980 and 1990.

Hastert, at 646 n.19. Therefore, the decisions made concerning these "communities of interest" by the parties to the *Hastert* proceeding depended upon the race of the community involved and were not "nonracial, political" decisions as the DOJ suggests.

The DOJ suggests that "communities 'that have been a part of her [Cardiss Collins'] district for three decades' continue as a part of District Seven". DOJ Motion, 24. In contrast, 1981 District Five was

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[2] The definition of "community of interest" seems elusive and synonymous with race. For the Defendants, obviously, it does not have anything to do with geographical proximity.

dissolved due to the changes in population and apparent need for an Hispanic District. Indeed, due to racial minority shifts, *see*, *Hastert*, *supra*, and the increase in population which each district had to incorporate, District Seven incorporated communities which were part of prior districts. See, 1981 Congressional Districts of Northeast Illinois, Supp. App. 1.

The DOJ suggests that if the population in District 7 were white, the "retention of an electorate by an incumbent would clearly have reflected legitimate, nonracial considerations." Yet in other Chicago area districts, several white incumbents were paired. Second, if there were a white population where African-American neighborhoods are now located in District Seven, parts might have been subsumed within a §2 district. In the Plaintiff's view, contorting a district around any racial group is no less racial.

Both District Seven and One were part of an overall racial scheme under §2, not the result of legislative political compromise. *See, Hastert*, at 650, (odd configuration of District Four due to accomodating the creation of "the three super-majority African-American districts dictated under the Voting Rights Act"). Part of that scheme was to create a congressional district with the noncontiguous and dispersed Hispanic populations on the north and south sides of Chicago.

Defendant-Intervenors, MALDEF, Bobby Rush, Timuel Black, Al Johnson and the Chicago Urban League (hereinafter "MALDEF/CUL") assert that the lower court's conclusion "the two enclaves of Hispanic population did not indicate separate communities, but they 'appear[ed] to have occurred as a result of exogenous physical and institutional barriers. . ." was not disputed by the Plaintiff. MALDEF/CUL Motion, 23. The Plaintiff asserted in

the trial court that where the two "enclaves" are nearly equally split on the northern and southern halves of Chicago, by 258,560 voters residing in between in District 7 who are predominantly African-American, there are separate communities involved, if the definition of "community" includes geographical proximity of persons. *See,* App. 100. If a "community" is not defined by geographical proximity of persons, then communities can exist simply by imagination. Furthermore, where such a substantial population resides in between the northern and southern portions of District Four, it necessarily follows that the Hispanic majority is too dispersed to meet the first *Gingles* factor.

The record establishes that the "western connector" was racially motivated. In *King* the lower court said

> the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

Opinion 1, App. 40. And, in respect to the "western connector" the lower court found that

> portions of the western connector are also explainable only on racial grounds. For example, the portion of the Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion of the township included in the Third Congressional District is 4.9% Hispanic and

79.3% white.

Opinion 1, App. 44-45, *see, also*, "Hispanic Population in the Townships of the 'Western Connector'", App. 83. And, furthermore, Dr. Taylor testified during the *Hastert* proceedings that the "western connector" was created to include expected growth areas for Hispanics as they moved further west, and thus was meant to become more racial than it already was over time. See, Supp. App. 3.

The "western connector" could not be predominantly "nonracial [and] political", *see, Bush*, 116 S.Ct. at 1962, since it was a necessary part of a district and overall scheme, the purpose of which was racial. No "nonracial [and] political" motive compelled the *Hastert* court to approve "western connector"; it was only race that compelled the court to do so. Where the "western connector" advances the racial purpose behind District Four and contributes most significantly to the bizarre shape and noncompactness of District Four it "cause[s] constitutional harm insofar as [it] convey[s] the message that political identity is, or should be, predominantly racial." *Bush*, 116 S.Ct., at 1962. And, where "appearances do matter", *Shaw I*, 113 S.Ct. at 2827, the "western connector" creates the impression of an openly race-based district.

The DOJ initially attempts to discount the importance of the "western connector" to the configuration of District Four by suggesting that any type of connector can constitutionally be used and the populations in the northern and southern portions of the district "contained sufficient population". DOJ Motion, 21. This contradicts the finding by the lower court that

> the [*Hastert*] court adopted a single majority-minority district which was limited in size to

> the *minimum* number of Hispanic residents generally believed necessary to counteract the effects of racial bloc voting and ensure that the Hispanic electorate had a reasonable opportunity to elect a candidate of its choice.

Opinion 1, App. 57 (emphasis added). Thus, any lesser percentage of Hispanic population in District Four, according to the lower court, would have defeated its remedial purpose. *See*, Opinion 1, App. 57.

None of the alternative connectors in the record indicate either a higher percentage of Hispanic total population or voting age population than the *Hastert* court's "western connector". For example, Def. Exh. G (MALDEF/CUL Motion, Attach.), presents a rather "chunky" connector, but only achieves 62.6% Hispanic population, while the contorted "western connector" created in *Hastert* achieves 65.03% Hispanic population.[3] The Plaintiff's evidence, "Hispanic Populations in the Townships of the 'Western Connector'," App. 83, shows that the "western connector" was used to achieve greater Hispanic populations and drew in, with one or two exceptions, all the majority blocks of Hispanic population in the townships of Cicero, Stickney and Proviso. *See*, Hispanic VAP/District 4 Overlay, Attach. This case, therefore, is analogous to *Bush* where the mapmakers in that case sought out additional far-flung minority populations. See, *Bush* at 116 S.Ct. at 1955.

Indeed, the racial deviation in the form of the "western connector", and block-by-block drawing around the whole of the district, resulted in administrative difficulties. The MALDEF/CUL assert

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[3] If the lower court did not have a strict adherence to a 65% figure, more flexible, logical boundaries for all districts would be possible.

that administrative difficulties, which were the result of the excessive splitting of precincts in District 4, occurred only in 1992 and thus could be excused. MALDEF/CUL Motion, 20. To ignore substantial administrative difficulties for any election cycle would seem to violate narrow-tailoring.

The record shows that after the 1992 elections administrative difficulties continued. The evidence indicates that, as of 1994, Stickney precinct 40 and Proviso precinct 132, both in the "western connector" still had only two (2) and one (1) voters, respectively. Lewis Test., App. 89, Selected Precinct Election Results, App. 90. Further, the proffer of proof by the Plaintiff to the lower court after remand indicates that the problems continued into 1996. See, Opinion 2, 61 n.1(a), (b). There is nothing in the record to show that there was a cure after the 1992 election cycle other than reducing the multi-district precincts from 400-450 in the summer of 1992. Sawicki Affidavit, App. 110 (¶10). MALDEF/CUL, in any event, are incorrect to suggest that pursuant to state law the administrative difficulties were eliminated after 1992: the record reflects continuing administrative difficulties.

MALDEF/CUL also suggest that where only 4.7% of the population gives rise to a non-compact appearance in the form of the "western connector", this should be considered *de minimus*. MALDEF/CUL Motion, 23 n.14. There is no comparison between the standard for population deviation with the "deviation" in the instant case, a substantial one in its percentage of the space of District 4, which picks and chooses Hispanic populations as it spreads out over miles of an urban center such as Chicago. Further, the use of race is different from population deviation because it triggers a federal court's strict scrutiny and

in particular instances, such as this one, should require narrow tailoring, *see, Miller v. Johnson*. It is inconceivable to consider the "western connector" a mere "deviation" when it is such a patently offensive use of race by the government.

MALDEF/CUL also suggest that "in Illinois, traditional districting principles do not include reliance on political boundaries for redistricting." MALDEF/CUL Motion 20, citing *Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1099 (N.D.Ill. 1982). In *Rybicki* otherwise compact and logical districts were not unconstitutional because they "*merely*. . . fracture[d] a number of political subdivision lines", *id.* at 1099 (emphasis added).

In *Schrage v. State Board of Elections*, 88 Ill.2d 87 (1981), the Illinois Supreme Court recognized the importance of political subdivision lines when it said that

> Deviations [from 1% population equality] are permitted, at least to the extent approved in the above cases, to accommodate the interests of political subdivisions. . . . 'Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.'

Schrage, at 104 (citing *Reynolds v. Sims*, 377 U.S. 533, 578-79. The Constitution of Illinois provides that "[l]egislative districts [and Representative Districts] shall be compact, contiguous, and substantially equal in population." Art. 4, §3(a).

The Defendants also assert that "boundary lines of villages, townships, counties and cities do not necessarily reveal communities of interests." *People of the State of Illinois ex rel. Burris v. Ryan*, 147 Ill.2d 282 (1991). This statement followed upon the statement by the court that "[s]tatistics do not

necessarily reveal compactness" and, therefore, the court was making the observation that boundary lines do not always reveal communities of interest. *Cf. Bush v. Vera*, 116 S.Ct., at 1962 (1996):

> cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts non-racial bases of political identity and thus intensifies the emphasis on race.

Id.

II. The Lower Court Lacked a "Strong Basis in Evidence" to Find That There Was a Violation of §2.

Both MALDEF/CUL and DOJ challenge the proposition that a minority group is required to constitute a majority in a §2 district, saying that the standard of 50% was established in order to ensure that a minority at least had the "*potential* to elect representatives in the absence of the challenged structure or practice." MALDEF/CUL Motion, 14, DOJ Motion, 17, each *citing Bush v. Vera*, 116 S.Ct. at 1970 (O'Connor, J. concurring). It is not clear that this portion of *Bush* stands for the proposition that less than a majority may be acceptable under *Gingles*, but rather where two possible designs existed for a reasonably compact district with 44% or 45.6% African-American populations, the State of Texas had a strong belief that the creation of a majority-minority district was possible. Further, assuming that the Plaintiff's citizenship VAP analysis reveals an "estimate", this is enough to negate the "*strong* basis in evidence" that the Defendant-Intervenors were required to show under strict scrutiny at the time of trial in December 1995.

Further, the Defendant-Intervenors both cite the election of Congressman Gutierrez, consistent with

the lower court, as evidence that District 4 contains sufficient Hispanic voters. MALDEF/CUL Motion, 14, DOJ Motion, 17, 19. *See, also*, Opinion 1, App. 50 ("the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion"), *see, also*, App. 47-48 (judicial notice of the election of Congressman Gutierrez in 1992 and 1994 "minimize in may respects the force of King's arguments that the *Hastert* court erred in finding that the three *Gingles* prerequisites were satisfied.") Congressman Gutierrez, while he knew that he received a majority of the vote of white voters, he was unable to say what percentage of the Hispanic vote he received. *See*, Gutierrez Test., Supp. App. 2.

The DOJ confuses "Hispanic candidates of choice" with "Hispanic candidates". DOJ Motion, 19 n.9. Dr. Lichtman's testimony was that "since 1987, *Hispanics* have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority". See, Dr. Lichtman's Report, Def. Int. Exh. 5.

The DOJ also asserts that drawing of the District at the census block level was necessary to comply with the strict one-person one-vote requirement. DOJ Motion, 20 n.10. The lower court did not so find, but said that census block data

> permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district.

Opinion 1, App. 43. Population equality could be achieved by splitting the last full neighborhood or precinct added to the district, not nearly every one along the border.

The DOJ also asserts that the record does not support that District Four's northern and southern promontory points were included in order to "capture additional Hispanic population". The lower court, citing the *Hastert* court, however, said that

> To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Opinion 1, App. 44, *citing*, *Hastert* at 648 n.24 (emphasis in original).

The Defendants assert that there is a "community of interest" among Hispanics in the northern and southern portions of the district on the basis of various socio-economic factors common to the residents of District 4 which are in contrast to the surrounding districts. MALDEF/CUL Motion, 26. Neither the lower court's opinions nor the record substantiates this assertion.[4] The lower court never found that a community of interest existed by reason of any socio-economic factors, nor that the districts had "substantially different socio-economic characteristics" nor that "the socio-economic characteristics of District Four contrasted greatly" with the African-American districts. *Contrast*, Opinion 1, App. 46 *with* Motion, 26. After noting that the socio-economic data was available only for block groups, while District 4 was drawn on the block level, the lower court found that "it is not surprising that superimposing the socio-economic data onto maps of

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[4] District 4 interlocks with Districts 1, 3, 7 and 5 each of which has a distinct racial composition and shows that the record substantiates the lower court's finding that the lines of District 4 correlated, not with socioeconomic factors, but race. Opinion 1, App. 46. *Compare*, "Chicago Metropolitan Area" Map, Supp. App. 5, *with* "Racial Majority by Block Group", Def.Int.Exh. 1, Supp. Attach. 3

the city's congressional districts reveals that the electorate of the Fourth District have more socio-economic characteristics in common than the electorate of the adjacent congressional districts." Opinion 1, App. 46.

The data presented by Dr. Taylor, however, indicate that there was, in fact, no noticeable contrast in the selected socio-economic factors affecting the residents of the Hispanic district and the residents of either the surrounding predominantly white or African-American districts, with one exception. For instance, review of "Map 7: Percent Greater Than High School Education", Supp. Attach. 1, shows that if the percentages of 0% - 39.99% and 40% - 49.99% were placed into a category of 0% - 50%, this section covers a specific geographic area which is covered by both District 4 and District 7, the predominantly African-American District. And compared to the table which shows averages for each district on high school education, 40.8% for Hispanics and 63.1% for African-Americans, see, Supp. Attach. 1, it is significantly low for both groups and, therefore, impossible to say that Hispanics are concerned about education while African-Americans are not or vice-versa. In another example, "Map 10: Percent Unemployed", Supp. Attach. 2, the map shows that there is substantial unemployment, 20% - 100% in District 7, while unemployment between 5% - 14.99% is similar in the various areas in District 4 and in the nearby white congressional districts. Likewise, Dr. Taylor's analysis concerning each of the other selected socio-economic factors he evaluated indicates that the differences are marginal and such that one racial/district group could not be considered to be concerned about the relevant congressional political implications while another is. See, Table A, Supp.

App. 4. Therefore, there is nothing in the record which reflects that the selected socio-economic factors affecting Hispanics in District 4 establish a separate "community of interest" apart from either of the neighboring African-Americans and whites, with the exception of speaking of Spanish in the households in District 4.

IV. CONCLUSION

To create a race-based "connector" which substantially contributes to noncompactness, as in the instant case, in essence violates §2's prohibition against proportional representation. *See, Gingles*, 106 S.Ct. 2752, 2789-90 (1986) (O'Connor, J. concurring) (relying only upon the inability to elect candidates of choice and ignoring local conditions and the extent of past discrimination will result in a standard which requires a form of proportional representation.) A disregard of traditional districting principles, including the geographical proximity of a minority population, becomes, in effect, nothing more than a quest for proportional representation.

Respectfully Submitted,

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No. 97-743

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

James R. King,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

SUPPLEMENTARY APPENDIX TO REPLY TO MOTIONS TO AFFIRM

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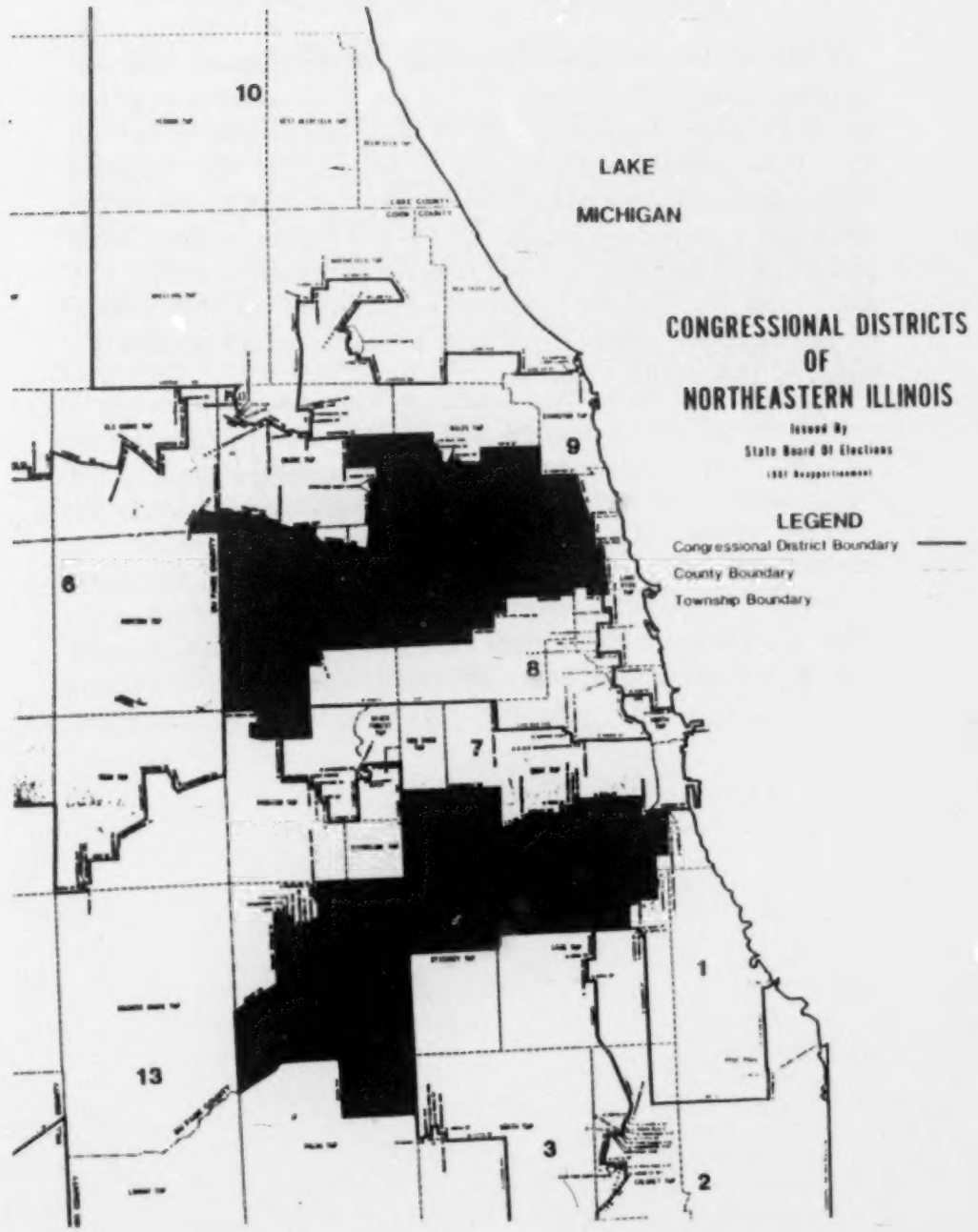

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TESTIMONY OF CONGRESSMAN LUIS GUTIERREZ

[T.544] Q: Do you know what percent of the Hispanic vote you received in the 1994 election? A: No, sir. I -- I cannot -- I can tell you that I received approximately 63 and a half percent of the total vote in the primary and I believe 77 percent, 78. The Gingrich revolution knocked me down from 80. That last time around I think that I lost 3 percentage points. Q: Do you happen to know what percentage of the white vote you recieved in the last election? A: I don't know, but I believe I received a majority of the white vote in the last election. I mean if you were to ask me what I believe. Q: Sure. A: That's what I believe.

TESTIMONY OF DR. TAYLOR
HASTERT V. STATE BOARD OF ELECTIONS
PLAINTIFF'S EXHIBIT 12

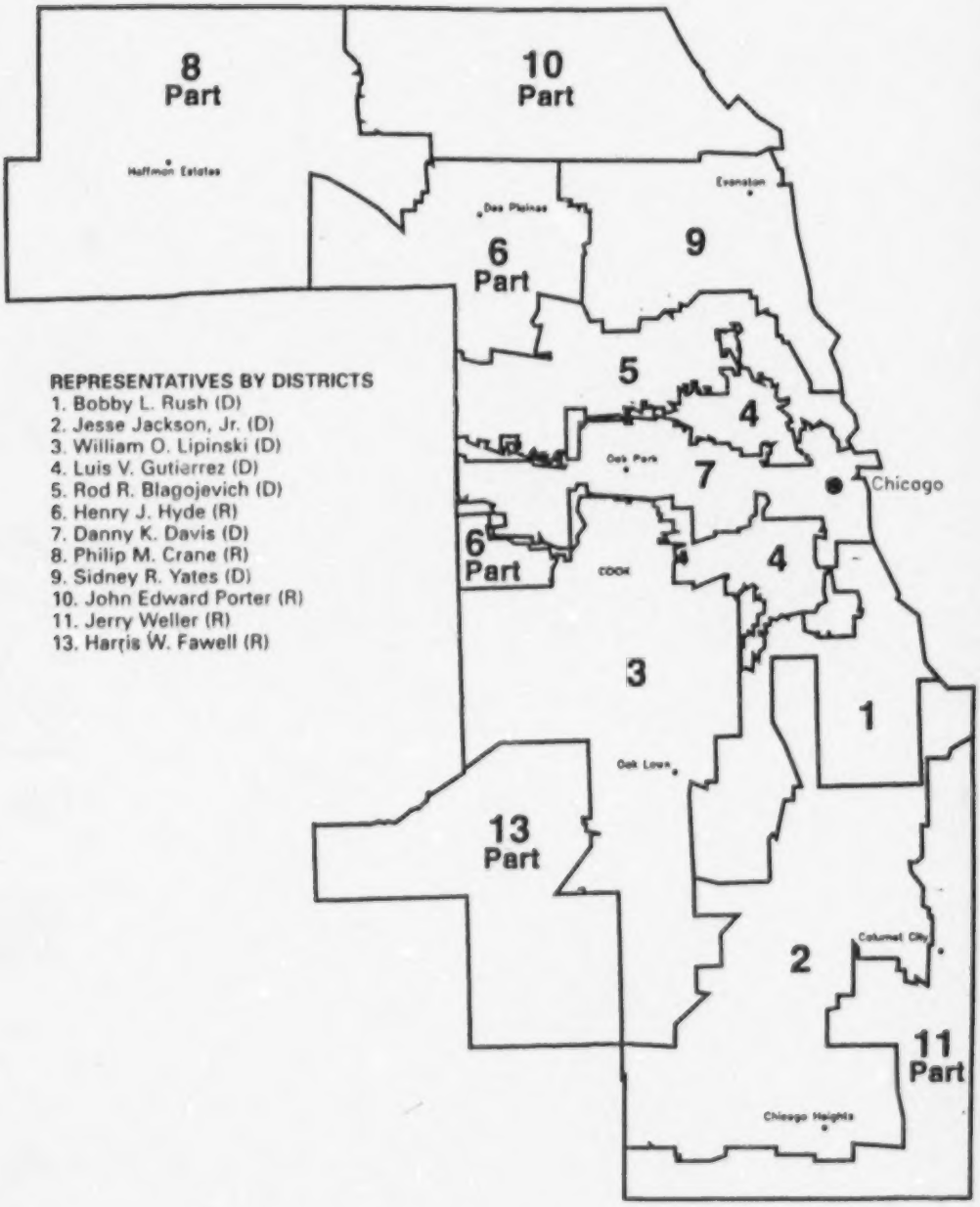
[111] Q: Now, Dr. Taylor, did you examine the western connector of the proposed Hispanic district with respect to Hispanic population change? A: Yes, I did. Q: And what did yo find when you did that examination? A: The western connector contains several areas that as we look at them on the map and on the overlay we can see that it includes several areas where the Hispanic population is, in fact, increasing in those areas, has been increasing for the last decade in those areas. Q: Based upon that examination, what is your prediction for the western connector? A: This is a strong basis to predict that the western connector will, in fact, become more Hispanic, well, that the areas in green will generally become more Hispanic over the next decade, but specifically, these areas in the western connector as well. Q: On what do you base that opinion, Dr. Taylor? A: The pattern of change in neighborhoods in Chicago and the Chicago region has been studied by sociologists and demographers for 30 or 40 years. And to make a long story short, neighborhoods go through periods of increasing concentration and increasing, you know, singleness of kinds of groups represented.

TABLE A: Socioeconomic Status of White, Black, and Latino Population
1990 U.S. Census Estimates

	Chicago		
	White	Af-Am.	Latino
Total Population	38.2%	38.7%	19.2%
Education			
(Age 25+) High School Diploma +	75.6%	63.1%	40.8%
(Age 25+) Bachelor's +	28.8%	10.5%	6.6%
Home Ownership	50.3%	33.9%	31.4%
Labor Force Participation (16+)	64.9%	58.7%	70.3%
Unemployment (If in L.F. 16+)	5.4%	19.4%	11.7%
Youth Labor Force Participation (16 - 19))	54.8%	35.1%	49.8%
Youth Unemployment (If in L.F. 16-19)	14.9%	45.6%	26.6%
Occupation			
Manager, Professional	33.7%	19.8%	9.9%
Technical, Sales, Administrative	34.2%	37.0%	22.9%
Service	11.9%	18.8%	17.4%
Skilled Blue Collar	9.1%	6.5%	12.7%
Unskilled Blue Collar	10.7%	17.6%	35.8%
Other	0.3%	0.2%	1.4%
Median Family Income	$40,874	$22,456	$25,219
Per Capita Income	$20,150	$8,587	$7,438
Families with Poverty Status	5.8%	29.7%	22.5%

Note: Data are calculated from 1990 U.S. Census STF-4 data set.
"White" refers to non-Latino White, "Af. Am." refers to non-Latino African American,
"Latino" refers to persons who identify themselves as Latino, regardless of race.

CHICAGO METROPOLITAN AREA



REPRESENTATIVES BY DISTRICTS

1. Bobby L. Rush (D)
2. Jesse Jackson, Jr. (D)
3. William O. Lipinski (D)
4. Luis V. Gutierrez (D)
5. Rod R. Blagojevich (D)
6. Henry J. Hyde (R)
7. Danny K. Davis (D)
8. Philip M. Crane (R)
9. Sidney R. Yates (D)
10. John Edward Porter (R)
11. Jerry Weller (R)
13. Harris W. Fawell (R)

Map 7: Percent Greater than High School Education

Open Space, Cemeteries
Water
Industrial
Highways
Major Roads
4th Congressional District

0% to 39.99%
40% to 49.99%
50% to 74.99%
75% to 100%
Missing

N
W
E
S

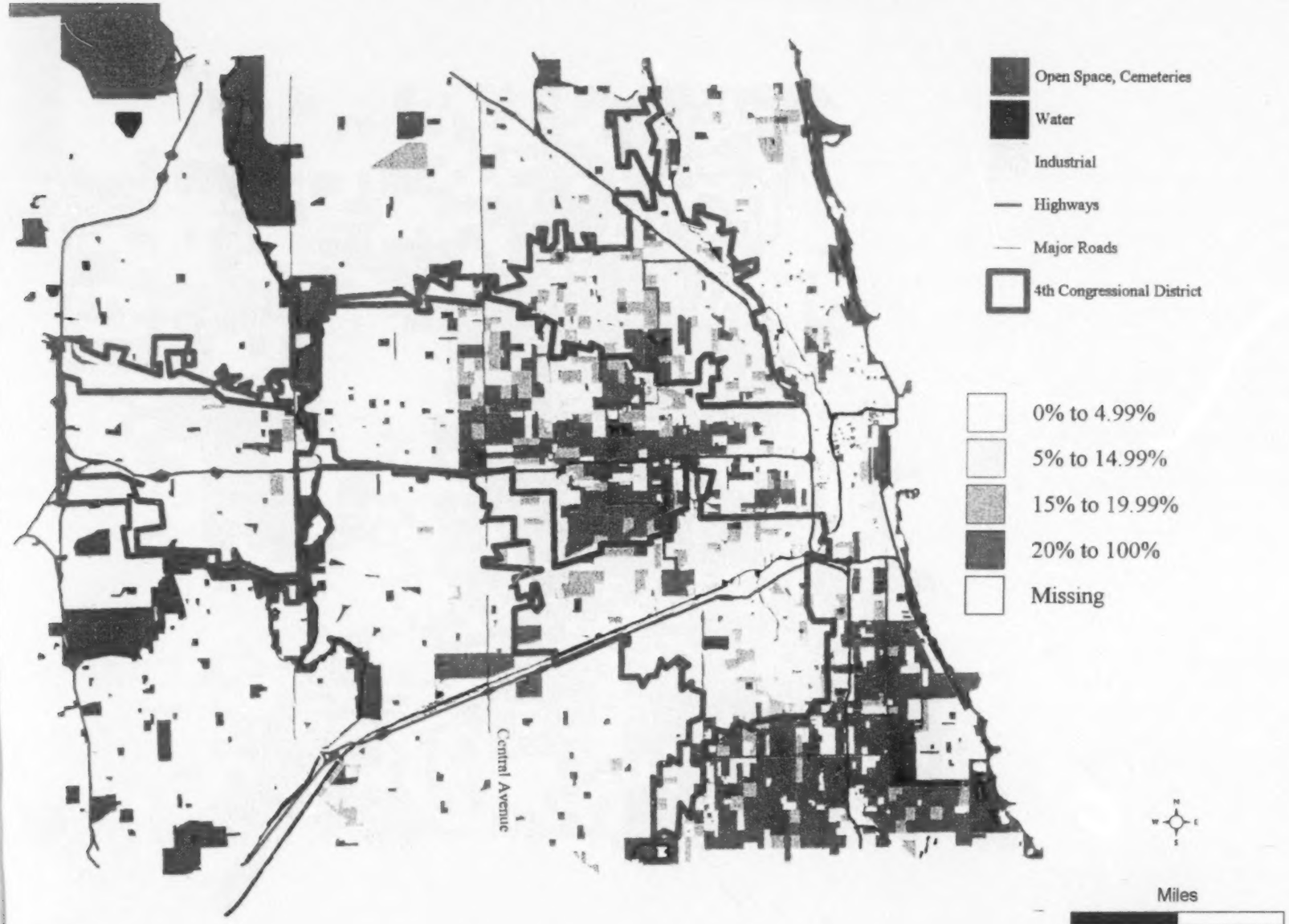
Miles
0
2
4

Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission

Attachment 2

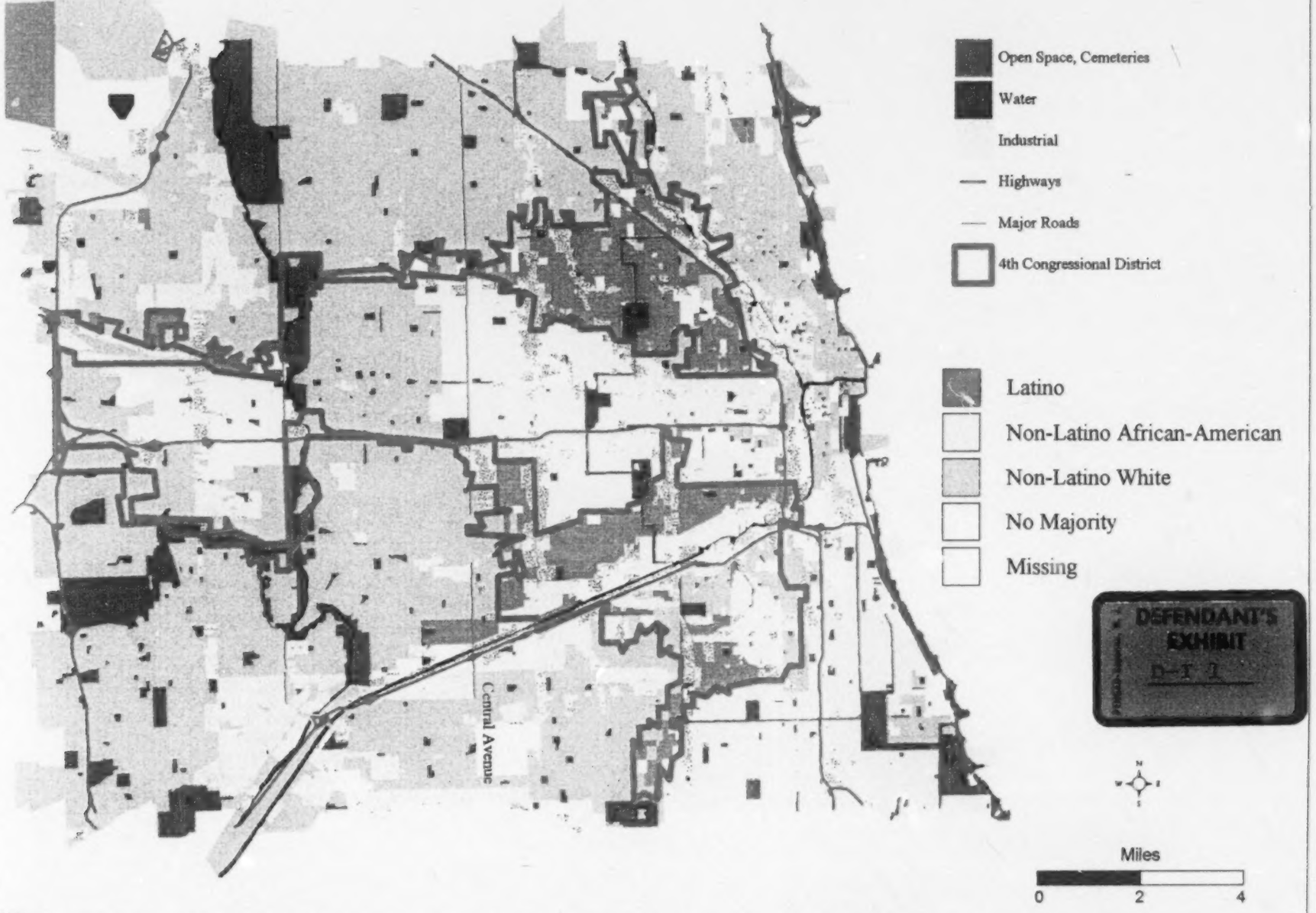
Map 10: Percent Unemployed



Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission

Racial Majority by Block Group



DEFENDANT'S EXHIBIT D-I 1

Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission